LAW AND CONTEMPORARY PROBLEMS

LAND PLANNING IN A DEMOCRACY

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FOREWORD

Proposals for economic and social planning inevitably arouse fierce controversy in this country today. Whatever their specific nature, there will be those who strongly oppose them because, rightly or wrongly, they fear that their interests will be adversely affected. Indeed there are many who apparently believe that such planning, if not fundamentally opposed to truly democratic values and principles, certainly is so hostile and incompatible that it should be kept at a minimum if the individual rights and liberties deemed so essential in a democracy are to be preserved against increasing encroachment by powerful government.

Land planning in a democracy, which is the subject of this symposium, involves controls over a form of individual property rights to which, historically at least, our common law legal system has often given a preferred position. Although our present industrialization does not, perhaps, in certain respects, place as much emphasis upon land ownership as a source of wealth, power, and liberty, as a more agricultural, feudal, or aristocratic society would, still the importance of land and home ownership in present day America cannot be denied.

In this country, any planning which involves control and limitation by the state of individual ownership and rights to land and property is bound to encounter constitutional limitations. So far as the Federal Constitution is concerned, land planning, particularly in the form of zoning, has on the whole encountered very few obstacles. The Supreme Court, although it has emphasized that fair and decent procedures must be followed under the due process clause and that the regulation must be reasonable as applied to the property involved in a specific case, has from the beginning recognized the constitutional validity of zoning and land planning and indeed now seems more firmly committed than ever to this approach. State courts have probably been somewhat less tolerant, no doubt because they are in a better position to see more clearly and frequently the possibilities in the day to day routine operations at the local level for abuses and inequities resulting from poorly devised or improperly executed zoning and planning schemes. In certain areas the courts may have hindered, though not blocked, orderly and rational land planning through strict adherence to a rigid doctrine that the Constitution does not sanction zoning and planning based solely upon aesthetic considerations. Currently this doctrine is gradually weakening and can usually be evaded without much difficulty.

More serious today are the new problems which land planning and zoning are facing which may well require an entirely fresh or reoriented approach to the whole subject. For example, traffic conditions in our cities and on our major highways have an importance for the contemporary planner not dreamed of in the first decades of the twentieth century. No zoning plans for a city can afford to ignore the crucial issues raised by traffic density and congestion. Again, the increasing prevalence since World War II of large scale housing and business developments, both private and governmental, poses new problems for planners through exposing gaps and inconsistencies in existing laws and regulations which did not envisage such large scale, overnight creation of entire communities. Also, urban communities, with their financial resources heavily strained by seemingly ever increasing demands for such services as water and sewer lines, schools, and streets, are rapidly awakening to the fact that haphazard development of new housing and business and industrial areas may prove too costly a drain on their diminishing ability to obtain adequate funds to meet the demands for services created by such growth. Older communities are also finding that planning for future growth and development is not enough. What is even more urgently needed is some way to remake the old, to eliminate incompatible structures and uses which long antedate current zoning and planning but which still continue to flourish with seemingly an interminable span of existence. Finally, as in almost every other field of administrative and governmental regulation and control, there are difficulties in obtaining sufficient competent planning personnel. In fact, there are indications already that some planning administrators are confused as to what should be the basic objectives of zoning and planning and may often be exercising their discretionary powers so as to thwart rather than forward the fundamental goals of land planning in a democracy.

Certainly we cannot afford not to have some land planning in a democracy. But the nature and extent of that planning—its goals and methods—are still largely unsettled, even though the needs daily become more urgent.

ROBERT KRAMER.

CONSTITUTIONAL LAW AND COMMUNITY PLANNING

CORWIN W. JOHNSON*

A study of the impact of constitutional law on community planning is largely an appraisal of the role of the courts in the process of planning the environment of communities. Although litigation concerning planning laws often raises issues unrelated to constitutional law, a significant characteristic of such litigation is its tendency to generate constitutional law issues. Since judicial decisions on constitutional law questions can usually be overridden only by amendment of the basic document, in contrast to decisions on common law and statutory issues, which may be altered by legislation, the courts are able to exert dominating influence upon community planning. In view of the importance of the interests at stake in determining the kind of communities in which people reside, work, rear their children, and seek fulfillment of the whole range of human aspirations, it is appropriate to consider whether, and in what respects, the courts have failed to protect deserving interests with constitutional safeguards and, on the other hand, have erected unnecessary or unwise constitutional obstacles to effective action.

Governmental regulation of economic activity and programs for economic and social betterment no longer are likely to face serious objections grounded in the United States Constitution. Attempts to have the powers of Congress construed narrowly have failed,[1] and the legislative powers of the states seem almost unlimited by the due process and equal protection clauses of the Fourteenth Amendment and the contract clause of Article 1, Section 10.[2] However, it would be a mistake to assume that there are no important problems of constitutional law today in local planning activities. A dominant characteristic of such activities is the alteration of traditional concepts of real property ownership. There may be some basis for a belief that the range of the police power of the states is narrower when property is regulated than when freedom of enterprise is controlled. At some undefinable point, regulation of

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[1] Steward Machine Co. v. Davis, 310 U.S. 548 (1937).

[2] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948). The position of the United States Supreme Court on state legislative powers was summarized recently in the following terms: "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits . . . But the state legislatures have Constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided." Douglas, J., in Day-Brite Lighting Inc. v. Missouri, *supra* at 423.

property shades into taking of property, which must be compensated,[3] though it must be conceded that the instances in which the Court has determined that this point was exceeded are rare, and that there have been some examples of extreme legislative encroachments upon property which have gone uncompensated.[4] The decision in *Nectow v. Cambridge*,[5] invalidating a zoning ordinance as applied, has never been overruled or disapproved and could lead to future decisions adverse to planning. Planning regulations may also impinge upon interests regarded by the Court as peculiarly in need of its protection, such as the right to own and occupy land without discrimination on account of race. Obvious discrimination is clearly invalid[6] and discrimination by subterfuge will surely be also. The difficult questions of the future may grow out of official action which is not directed toward racial discrimination, but which has discriminatory effects, such as segregation of economic classes through zoning. Constitutional law is an even more important factor in the state courts, which have not exhibited restraint comparable to that of the United States Supreme Court. They continue to strike down much economic and social legislation on the ground that it violates due process and other provisions of state constitutions.[7]

REVIEW OF CASES IN THE UNITED STATES SUPREME COURT

A chronological review of community planning cases decided by the United States Supreme Court might well start in 1909 with *Welch v. Swasey*,[8] in which the Court rejected contentions that a Massachusetts statute directing creation of two building height districts in Boston deprived landowners of property without due process of law and denied equal protection of the laws, in violation of the Fourteenth Amendment. Mr. Justice Peckham said that in determining the reasonableness of regulations of this type, "the matter of locality assumes an important aspect" and that the United States Supreme Court should attach great significance to the judgment of the highest court of Massachusetts, which had upheld the statute. However, Mr. Justice Peckham cautiously avoided a determination whether the police power could be exercised for a "merely esthetic purpose," concluding that this measure might have had as its aim the protection of residential areas from the risks of collapsing walls of tall buildings gutted by fire. The opinion contained no intimation that the regulation had any relation to the goals of preventing overcrowding

[3] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). What Mr. Justice Holmes said in that opinion should be compared with the following statement made by him elsewhere: "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." Block v. Hirsh, 256 U.S. 135, 155 (1921).

[4] *E.g.*, Miller v. Schoene, 276 U.S. 272 (1928).

[5] 277 U.S. 183 (1928).

[6] *E.g.*, Barrows v. Jackson, 346 U.S. 249 (1953).

[7] See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

[8] 214 U.S. 91 (1909).

of residential neighborhoods and securing adequate light and air for such sections. And, of course, traffic congestion was not yet a problem.

Three years later, the Court demonstrated that it would not always defer to the views of state courts on the reasonableness of urban land use controls. In *Eubank v. Richmond*,[9] it held, reversing a judgment of the Supreme Court of Appeals of Virginia, that an ordinance authorizing the owners of two-thirds of the property abutting any street to establish a building line not less than five feet nor more than thirty feet from the street line was "an unreasonable exercise of the police power." The Court had no objection to building lines. What it disapproved was the placing of uncontrolled discretion in landowners to establish such lines. The Court reasoned that since the ordinance was devoid of standards, there would be no necessary relation between building lines established and the "public safety, convenience, or welfare."

In 1915, the Court had before it in two cases municipal ordinances excluding certain established businesses, livery stables in *Reinman v. Little Rock*[10] and brickmaking in *Hadacheck v. Sebastian*,[11] from designated portions of the city. Both were upheld, despite allegations of substantial hardship, especially severe in the case of the brickmaker, who claimed that, although the ordinance did not prohibit the removal of his clay, the clay could be made into bricks economically only if the brickmaking process occurred at the site of the deposits, and that the value of his land was reduced from $800,000 to $60,000. A factor which apparently influenced the Court in these cases was that livery stables and brickmaking might in some situations be nuisances. Thus, the ordinances could be viewed as legislative efforts to deal with potential nuisances. The contention that the ordinance excluding brickmaking denied equal protection of the laws because it did not also exclude other commercial enterprises from the district and because brickmaking was permitted in other parts of the city where similar conditions existed was answered by the statement that there was no proof that other "objectionable" businesses were actually present in the district from which brickmaking was excluded and that the city might in the future deal with brickyards in other localities in the community.

The attention of the Court shifted in 1917 from livery stables and brickyards to billboards, which were prohibited by a Chicago ordinance in residential neighborhoods unless the owners of a majority of the frontage of the property on both sides of the street consented. In *Thomas Cusack Co. v. Chicago*,[12] the ordinance was held not to violate the due process or equal protection clauses of the Fourteenth Amendment. Evidence introduced at the trial tending to show that offensive, unsanitary and combustible materials usually accumulate around billboards and that billboards afford convenient shields for immoral and criminal activities was regarded as sufficient to establish the propriety of putting billboards, as distinguished from buildings and fences, in a class by themselves. In other words, although billboards may not be

[9] 226 U.S. 137 (1912).
[10] 237 U.S. 171 (1915).
[11] 239 U.S. 394 (1915).
[12] 242 U.S. 526 (1917).

nuisances, they are likely to breed nuisance-like conditions. There was still no suggestion that a city could, within the Constitution, specify the location of certain uses of land for the sole reason that such locations were appropriate for such uses, in the judgment of local officials. The Court did, however, express a policy of judicial tolerance and left the door open for doctrinal development and expansion.[13] The provision on the consent of property owners was held valid for the dubious reason that it only allowed property owners to remove a restriction and thus was unlike the consent clause held void in *Eubank v. Richmond, supra,* which authorized property owners to impose a restriction. The lack of substance in this distinction might reasonably have led a contemporary observer to conclude that *Eubank* had been tacitly overruled.

A much more significant contribution by the Court in 1917 was its decision in *Buchanan v. Warley* that a municipal ordinance creating separate residence districts for white and "colored" people was void because repugnant to the due process clause of the Fourteenth Amendment.[14] There was nothing in the opinion, however, which would cast doubt upon the validity of zoning laws not involving racial segregation.

Two cases decided by the Court in 1919 added very little, if anything, to the development of constitutional doctrine in this field. In *St. Louis Poster Advertising Co. v. St. Louis,*[15] an ordinance regulating the size, height, and location on the lot of billboards was upheld. Mr. Justice Holmes thought that the question had already been decided in *Cusack*. In *Pierce Oil Corp.* v. *Hope,*[16] petroleum storage tanks were added to the class composed of livery stables, brickyards, and billboards. An ordinance forbidding the storing of petroleum and related products within 300 feet of any dwelling was held not to deprive one of due process of law who had an established business the removal of which was required by the ordinance. Mr. Justice Holmes said that even if it were true as alleged (which the Court doubted) that the mode of construction of plaintiff's tanks made an explosion impossible, still the fact that the "necessarily general form of the law embraced some innocent objects . . . would not be enough to invalidate it or to remove such an object from its grasp."[17]

The cases reviewed to this point all involved regulatory programs. In *Green v. Frazier,*[18] decided in 1920, the Court passed upon an affirmative program of development. North Dakota legislation authorizing a state agency to provide urban and rural homes for residents of the state and to engage in certain other activities was challenged on the grounds that the program constituted a taking of property without due process of law and involved the use of tax revenues for private purposes. Upholding the statute, the Court conceded that the due process clause of the Fourteenth Amendment forbids state taxation for private purposes, but deferred to the determination by state authorities that the purpose in this case was public. This case and

[13] *Id.* at 530.
[14] 245 U.S. 60 (1917).
[15] 249 U.S. 269 (1919).
[16] 248 U.S. 498 (1919).
[17] *Id.* at 500.
[18] 253 U.S. 233 (1920).

the earlier case of *Jones v. Portland*,[19] upholding a Maine statute authorizing municipalities to engage in the enterprise of selling wood, coal, and fuel, seem to have had the practical effect of eliminating any public purpose limitation in the Fourteenth Amendment upon state taxation. Specific public purpose requirements of state constitutions have been more troublesome.

A still different type of land control program was scrutinized by the Court in 1921 in *Block v. Hirsh*,[20] holding that an act of Congress establishing rent control for the District of Columbia following World War I did not deprive landlords of property without due process of law or take their property without compensation. Speaking for the Court, Mr. Justice Holmes referred to *Welch v. Swasey* and related cases and declared that "if to answer one need the legislature may limit height to answer another it may limit rent."[21] The four dissenting members of the Court, fearful that approval of rent control during a period of war emergency would lead to approval of an indeterminate program, insisted that there is a material distinction between rent control and use control, the latter being justified as prohibiting the "use of property to the injury of others, a prohibition that is expressed in one of the maxims of our jurisprudence."[22] Similar New York legislation was upheld in *Brown Holding Co. v. Feldman*[23] and in *Levy Leasing Co. v. Siegel*.[24]

One of the most significant contributions by the Court to community planning was its approval in 1926 of a comprehensive zoning ordinance, providing for use, height and area districts, in *Euclid v. Ambler Realty Co.*[25] It did much to dispel the hostility manifested by some state courts toward zoning and may have induced state legislatures and local governments to enact zoning legislation. An adverse decision would have been a most serious blow to planning efforts.[26] The law of nuisances is to be regarded merely as a "helpful aid" rather than as limiting the scope of the police power. Changing conditions require successive definitions of that power. It now includes the "creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded," even though this means that the market value of some parcels of land is drastically reduced, it having been alleged in this case that the market value of land especially adapted for industrial development was reduced by residential zoning from $10,000 per acre to $2,500 per acre. However, the Court manifested reluctance to abandon nuisance concepts completely, concluding that even apartment houses may under some circumstances "come very near to being nuisances." And Mr. Justice Sutherland's opinion has been criticized on the ground that it related the provisions of the ordinance strictly "to the health and safety of the community" and ignored considerations of "the stabilizing effect upon land values, of the beautification of a city through orderly development of improvements and of aesthetic satis-

[19] 245 U.S. 217 (1917). [20] 256 U.S. 135 (1921). [21] *Id.* at 156.
[22] *Id.* at 167. [23] 256 U.S. 170 (1921). [24] 258 U.S. 242 (1922).
[25] 272 U.S. 365 (1926).
[26] Planners had concluded that effective zoning could not be achieved through the power of eminent domain. EDWARD M. BASSETT, ZONING 27 (2d ed. 1940).

faction in its bearing upon human well-being."[27] But another commentator has marveled at the opinion's liberal and tolerant attitude, compared with the Court's decisions of the period invalidating other types of economic and social legislation.[28]

Although the zoning ordinance involved in *Euclid* provided for use, height and area districts, the attack there was centered upon the use restrictions. Area regulation was considered in *Gorieb v. Fox*,[29] where the Court upheld establishment of a building line, requiring that a proposed building be set back almost thirty-five feet from the street line. The same principles justifying use restrictions were deemed to support regulations of area as well. The fact that building lines set back from streets may have the effect of minimizing cost to the local government of future street widening was not mentioned by the Court. This case is also important because it sanctioned the special permit device. The ordinance provided that the line must be at least as far from the street as that occupied by 60 per cent of the existing houses in the block, but by a proviso the city council reserved authority to make exceptions and permit the erection of buildings nearer the street. In this case the council, acting under the proviso, established the line for one lot at thirty-four and two-thirds feet in a block where the established line was slightly over forty-two feet. This discretion of the city council was deemed distinguishable from giving similar discretion to neighboring property owners, and also presumably different from vesting it in an administrative agency. Though abuses of discretion by the city council would not be countenanced, the existence of discretion to establish different lines for individual lots is not unconstitutional.

The Court was careful to point out in its *Euclid* opinion that, due to the nature of the allegations of the plaintiff landowner, the decision there amounted to little more than approval of zoning in principle. Specific zoning ordinance provisions and applications of zoning ordinances to particular parcels of land might still be held unconstitutional. Later in the same term, in *Zahn v. Board of Public Works*,[30] a residential classification of a section of the city which was largely undeveloped, but which contained scattered business uses and embraced land adjoining a major thoroughfare, was upheld on the theory that it was not clearly unreasonable. But in the next term, the Court demonstrated that the caveat in the *Euclid* opinion was to be taken seriously. Reversing a judgment of the Supreme Judicial Court of Massachusetts, the Court held invalid in *Nectow v. Cambridge*[31] the inclusion of certain land within a residential district. The land in question was a portion of a larger tract of vacant land separating residential uses from industrial uses. The evident purpose of the zoning authorities was to protect the established residential character of the lands lying on the other side of intersecting streets bordering the vacant tract. A master appointed by the trial court found that "no practical use can be made of

[27] Miner, *Some Constitutional Aspects of Housing Legislation*, 39 ILL. L. REV. 305, 311 (1945).
[28] Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, 16 VA. L. REV. 689, 699 (1930).
[29] 274 U.S. 603 (1927). [30] 274 U.S. 325 (1927). [31] 277 U.S. 183 (1928).

the land in question for residential purposes" and that "districting of the plaintiff's land in a residence district would not promote the health, safety, convenience and general welfare of that part of the defendant City." Despite these findings, the Supreme Judicial Court of Massachusetts did "not feel that the zoning line established was whimsical, without foundation in reason."[82] The reversal by the United States Supreme Court was based primarily upon the finding of the master, "supported, as we think it is, by other findings of fact," that the challenged classification would not promote the traditional police-power objectives. The Court could see no reason why the boundary between the residential and industrial districts should not be moved 100 feet. The opinion fails to reveal the scope of the Court's study of the effect of the judicially created boundary upon the neighborhood or upon the zoning plan for the city.

One might have supposed that the meaning of *Nectow* was that the Court intended to supervise closely exercises of the recently approved zoning power. But the immensity of such a task makes this supposition absurd. Indeed, the Court has never again passed upon a zoning case. The Court's purpose, then, must have been to guide the state courts. Yet, the standards set forth for their guidance are not clearly discernible. Since the master found that no practical use could be made of the land in question for residential purposes, it might be concluded that the Constitution requires that if land is zoned, the classification must permit a use for which the land is adapted. The difficulty with this is that the Court did not appear to attach any significance to that finding of the master. We are left with the generalization that the classification must promote the "health, safety, convenience and general welfare of the inhabitants of the part of the city affected." Apart from its vagueness, this standard, if a serious attempt were made to apply it, would imperil most zoning boundaries. While it is easy to demonstrate the beneficent effects of a comprehensive zoning ordinance upon a city, it is almost impossible to prove that an isolated segment of a zoning line will promote traditional police power objectives. Surely the Court was not instructing the state courts that the proper procedure in zoning cases is to appoint a master and accept his conclusion as to con-

[82] "If there is to be zoning at all, the dividing line must be drawn somewhere. There cannot be a twilight zone. If residence districts are to exist, they must be bounded. In the nature of things, the location of the precise limits of the several districts demands the exercise of judgment and sagacity. There can be no standard susceptible of mathematical exactness in its application. Opinions of the wise and good well may differ as to the place to put the separation between different districts. Seemingly there would be great difficulty in pronouncing a scheme for zoning unreasonable and capricious because it embraced land on both sides of the same street in one district instead of making the center of the street the dividing line. . . . No physical features of the locus stamp it as land improper for residence. Indeed, its accessibility to means of transportation, to centers of business, and to seats of learning, as well as its proximity to land given over to residence purposes, give to it many of the attributes desirable for land to be used for residence. . . . Courts cannot set aside the decision of public officers in such a matter unless compelled to the conclusion that it has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense. These considerations cannot be weighed with exactness. That they demand the placing of the boundary of a zone one hundred feet one way or the other in land having similar material features would be hard to say as matter of law." Nectow v. Cambridge, 260 Mass. 441, 447, 448, 157 N.E. 618, 620 (1927).

formity of the questioned zoning with the police power. A charitable critic might say that all the Court was trying to do in *Nectow* was to caution the state courts to be vigilant in correcting abuses of the zoning power, and that the Court's language was deliberately vague because the Court appreciated the difficulty of applying specific criteria uniformly in the solution of problems where local conditions assume great importance.

The Court had declared in *Euclid* that its decision there did not preclude subsequent successful attack upon either applications of zoning ordinances to particular lands or upon specific provisions of typical zoning ordinances. *Nectow* was an illustration of the former. The latter was illustrated by *Washington* ex rel. *Seattle Title Trust Co. v. Roberge*,[33] in which the Court revisited the problem of consent clauses, this time holding invalid a provision that "A philanthropic home for children or for old people shall be permitted in first residence district when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred feet of the proposed building." *Cusack* was distinguished on the ground that the proposed building was not like billboards or other uses which "by reason of their nature are liable to be offensive." It now seemed clear that the distinction between consent clauses which impose restrictions and those which only remove restrictions, if not repudiated, would rarely be applicable.

Excess condemnation received the Court's attention in 1930. Condemning land for the immediate purpose of widening a street, the City of Cincinnati undertook to acquire more land than would be occupied by the widened street. The constitutional question was whether the excess land was acquired for a public purpose if the sole reason for its acquisition was recoupment of the expense of street widening through the resale of neighboring lands, enhanced in value by the improvement. The Court deemed it well established that the due process clause of the Fourteenth Amendment requires that the power of eminent domain be exercised for a public purpose, but declined to pass upon the issue in this case for the reason that the state court judgment adverse to the city was supportable on the ground that the condemnation proceedings failed to conform to applicable state law.[34] There was nothing in the opinion suggesting that the practice in question would be favored.

Thirteen years passed without an important decision by the United States Supreme Court in this field. Then came decisions upholding national rent control programs during and after World War II.[35] It was also held that Congress has power to provide low-cost public housing and may exempt from local taxation projects owned by the Federal Public Housing Authority.[36] In *Queenside Hills Realty Co. v. Saxl*,[37] the Court shored up local efforts to deal with slum housing by its holding that a New York law requiring installation of expensive fire prevention

[33] 278 U.S. 116 (1928).
[34] Cincinnati v. Vester, 281 U.S. 439 (1930).
[35] Woods v. Miller Co., 333 U.S. 138 (1948); Bowles v. Willingham, 321 U.S. 503 (1943).
[36] Cleveland v. United States, 323 U.S. 329 (1945).
[37] 328 U.S. 80 (1946).

sprinkler systems in lodging houses did not violate the due process or equal protection clauses of the Fourteenth Amendment, even as applied to buildings equipped with other types of fire protection devices alleged to be adequate. The decision was hardly unexpected. The "public use" limitation upon eminent domain again engaged the Court in *United States* ex rel. *T.V.A. v. Welch*,[38] a case which did not directly involve community planning, but which had implications for it. Upholding condemnation by the T.V.A. of lands not strictly necessary for a proposed dam and reservoir, the Court manifested extreme reluctance to upset condemnation proceedings for want of a public use, and apparently all but three of the Justices were willing to regard as final a determination by Congress that a use is public.

The recent historic decisions on racial restrictive covenants are well known.[39]

The most recent case is *Berman v. Parker*,[40] decided during the 1954-55 term, holding that condemnation of property pursuant to the District of Columbia Redevelopment Act of 1945 was for a public purpose and was consistent with due process of law, and that the delegation of authority in the act was qualified with sufficient standards. There was unanimous concurrence in Mr. Justice Douglas' opinion that the police power of Congress over the District of Columbia, deemed as extensive as the police power of the states, comprehends a wide discretion in the acquisition and redevelopment of large blocks of land. An attempt to hobble this discretion by limiting it to elimination of slums, defined narrowly as the existence of conditions injurious to the public health, safety, morals, and welfare, was brushed aside. The standards contained in the act in question were considered adequate to sanction the redevelopment of not only slums, but also "the blighted areas that tend to produce slums," including particular lots which are not blighted at all. The police power, the Court indicates, is even broader, embracing redevelopment for the general objective of achieving a "better balanced, more attractive community." The Court does its best to make it clear that the "traditional applications" of the police power—"public safety, public health, morality, peace and quiet, law and order"—are merely illustrations of the police power, not limitations upon it. Aesthetic and spiritual values may also be sought through exercises of this power. As for the power of eminent domain, the "role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[41] It was concluded that the acquisition of land for redevelopment might be done by private enterprise subject to public control, the use of private enterprise being regarded merely as a means to an end within the power of Congress.

Berman v. Parker is of the utmost importance. Not only does it sanction a

[38] 327 U.S. 546 (1946).

[39] Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948).

[40] 348 U.S. 26 (1954). Four years earlier, in a similar case, involving the Urban Redevelopment Law of Pennsylvania, the Court had affirmed the judgment below (upholding the law) with a memorandum opinion, citing the *Welch* case, *supra* note 38. Burt v. Pittsburgh, 340 U.S. 892 (1950).

[41] Berman v. Parker, 348 U.S. 26, 31, 32, 35 (1954).

planning device which is the most promising yet attempted at the local level, but it also manifests a sympathetic and tolerant attitude toward community planning in general. The broad reading of the opinion is that the Constitution will accommodate a wide range of community planning devices, as states and local governments seek new ways to meet the pressing problems of community growth, deterioration, and change.

This conclusion is also borne out by the record of the United States Supreme Court in the line of cases reviewed here, commencing with *Welch v. Swasey*. The only decisions adverse to planning programs were *Eubank v. Richmond, Seattle Title Trust Co. v. Roberge,* and *Nectow v. Cambridge*. None of these could fairly be considered major setbacks for community planning. Consent clauses in land use regulations, invalidated in *Eubank v. Roberge,* are not essential and are probably undesirable.[42] It was not a planning device, but only the zoning classification of a particular tract of land, which was held void in *Nectow*. The Court handled the problem there badly, but not even the most ardent planner would deny that abuses in zoning can and do occur or assert that the courts should ignore such abuses. Perhaps the most serious criticism which can be leveled at the performance of the Court in this series of cases is that the overly cautious language in some of the opinions may have deterred legislative advances and have induced restrictive action by state courts.

A full appraisal of the role of the Court requires consideration not only of its decisions, but also of the instances in which it has avoided decision by refusing to review lower court judgments. During the past six terms of the Court (1949-1950 to 1954-1955, as of January 1, 1955), the Court has declined to review, by dismissing appeals or denying petitions for certiorari, twenty-one cases which might fairly be regarded as local planning cases. In all of these except one, the judgments below upheld statutes, ordinances or actions by local officials. The single exception was a holding below that the granting of a variance by a zoning board of appeals was invalid.[43] Thus, the record of the Court in abstaining from review of local planning cases during this period has been decidedly favorable to planning programs.

[42] See Note, *The State Courts and Delegation of Public Authority to Private Groups,* 67 HARV. L. REV. 1398 (1954).

[43] Board of Zoning Appeals of Hempstead v. Clark, 340 U.S. 933 (1951). The other cases: McCarthy v. Manhattan Beach, 348 U.S. 817 (1954) (zoning); Jayne v. Detroit, 348 U.S. 802, 889 (1954) (parking meters); Kaskel v. Impellitteri, 347 U.S. 934 (1954) (urban redevelopment); Gazan v. Corbett, 346 U.S. 822 (1953) (zoning); Carlor Co. v. Miami, 346 U.S. 821 (1953) (eminent domain); Elsato Real Estate, Inc. v. Miami Beach, 346 U.S. 820 (1953) (zoning); Lionshead Lake, Inc. v. Wayne, 344 U.S. 919 (1953) (zoning); Veal v. Leimkuehler, 344 U.S. 913 (1953) (zoning); White v. Chicago Land Clearance Commission, 344 U.S. 824 (1952) (urban redevelopment); Mundet Cork Corp. v. New Jersey, 344 U.S. 819 (1952) (smoke control); Flora Realty & Investment Co. v. Ladue, 344 U.S. 802 (1952) (zoning); Cherrywood Apts., Inc. v. United States, 342 U.S. 902 (1952) (public housing); Newark v. New Jersey Turnpike Authority, 342 U.S. 874 (1951) (eminent domain); Dallas County Water Control and Improvement District No. 3 v. Dallas, 340 U.S. 952 (1951) (municipal annexation); Prunk v. Indianapolis Redevelopment Commission, 340 U.S. 950 (1951) (urban redevelopment); Marsh v. El Dorado, 340 U.S. 940 (1951) (municipal annexation); Standard Oil Co. v. Tallahassee, 340 U.S. 892 (1950) (zoning); Corporation of Latter Day Saints v. Porterville, 338 U.S. 805 (1949) (zoning); Glissmann v. Omaha, 339 U.S. 960 (1950) (zoning); Keyes v. Madsen, 339 U.S. 928 (1950) (compulsory building demolition).

PATTERN OF STATE COURT DECISIONS

In contrast to the paucity of community planning cases decided by the United States Supreme Court, the state courts have poured out a flood of decisions, many of which involve issues of constitutional law, state and national. In general, planning, as well as other types of social and economic programs, have not fared as well in the state courts as in the United States Supreme Court. At the hands of some state courts, broad concepts of constitutional law—substantive due process, equal protection of laws, separation of powers, nondelegation of legislative power, public purpose in taxation and spending, public use in eminent domain—have become rigid and narrow. Possibly most of the adverse decisions are properly viewed as irritants rather than as crippling blows to planning. At least since *Euclid,* it appears that there has been general judicial acceptance of the principle that local governments may attempt to control the physical condition of their communities, that, within limits, public decisions as to land use shall prevail over private decisions, and that even substantial losses in some land values caused by community plans need not be compensated. The unfavorable decisions have involved particular planning programs, usually those thought to impose excessive sacrifices, discrimination or unfair procedures, and sometimes programs involving features regarded as novel or as specifically forbidden by constitutional provisions. A few illustrative cases, selected from the areas of planning administration, planning instrumentalities, and planning decisions, will be considered briefly.

A. Planning Administration

Ideally, there should be insistence upon constitutional procedures which are sufficiently stringent to promote fairness, but not so inflexible or impracticable as to stifle effective action. One of the more frequently raised questions is whether there is an improper delegation of power to an administrative agency.

This challenge, no longer a potent threat to acts of Congress, is still formidable when state legislation and local ordinances are being tested.[44] It can usually be overcome, in advance, by a careful statement of standards, which may satisfy the courts that administrative power is thereby restrained, but which in reality afford hardly any protection against arbitrary action.[45]

The incidence of invalidations of statutes and ordinances on this ground may be a commentary on the quality of legislative draftsmanship at state and local levels. There are some instances of judicial punctiliousness, however, which it is doubtful even the most meticulous draftsman would have anticipated. For example, an Illinois ordinance was held invalid which directed the building inspector to refuse a building permit for the erection of a building not having its principal frontage upon a "street or officially approved place," on the ground that the ordinance contained no definition of "officially approved place."[46] A Florida zoning ordinance was not saved from

[44] KENNETH C. DAVIS, ADMINISTRATIVE LAW c. 2 (1951).
[45] *Ibid.*
[46] Schimpff v. Norvell, 368 Ill. 325, 13 N.E.2d 960 (1938).

attack recently by an elaborate specification of details. It provided that in a Business "A" District, "no operation shall be carried on which is injurious to the operating personnel of the business or to the other properties, or to the occupants thereof by reason of the objectionable emission of cinders, dust, dirt, fumes, gas, odor, noise, refuse matter, smoke, vapor, vibration, or similar substances or conditions." The court, stressing the word "objectionable," construed the ordinance as being conditioned upon the objections of neighbors, and thus equated it with consent clauses.[47] Since ordinances can easily be amended, the effect of such decisions may not be extremely serious. But, of course, before the ordinance can be amended, a few enterprisers may have escaped regulation and have established "vested" rights, and it is conceivable that frequent invalidations of planning ordinances would have a demoralizing effect upon planning efforts.

On occasion, the state courts have condemned as inadequate standards which were about as specific as they could be, in light of the nature of the administrative task. Perhaps the best known example is *Welton v. Hamilton*,[48] holding invalid the grant of power to a board of zoning appeals to vary the application of the ordinance in instances where "there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the ordinance . . . so that the spirit of the ordinance shall be preserved. . . ." If the standard were much more specific than this, it is doubtful that a board of zoning appeals could perform satisfactorily the function expected of it, the essence of which is the handling of unforeseen problems. This decision seemed especially serious since it invalidated the enabling statute as well as the ordinance. Yet, perhaps surprisingly, *Welton v. Hamilton* has not actually prevented the exercise of broad administrative power to grant zoning variances during the more than twenty years since it was handed down, according to a recent study of the Illinois situation.[49] An innocuous amendment of the enabling statute, substituting "particular hardship" for "unnecessary hardship" and requiring findings of fact, apparently has sufficed.[50] Indeed, boards of zoning appeals in Illinois, as well as elsewhere, have been criticized for over-leniency.[51]

B. Planning Instrumentalities

The banning of a useful planning tool is likely to be a more serious matter than either the insistence upon excessive standards of administration or the invalidation of particular planning decisions.

After the *Euclid* decision in 1926, the state courts which had not already done so came around to the conclusion that zoning, at least in principle, was compatible with their state constitutions, as well as with the United States Constitution.[52] The

[47] Phillips Petroleum Co. v. Anderson, 74 So.2d 544 (Fla. 1954). However, the action taken under the ordinance in this case did appear to be arbitrary.

[48] 344 Ill. 82, 92, 176 N.E. 333, 337 (1931), discussed in Freund, Note, 26 ILL. L. REV. 575 (1932).

[49] See Dallstream and Hunt, *Variations, Exceptions and Special Uses*, 1954 U. OF ILL. LAW FORUM 213.

[50] *Id.* at 217.

[51] Comment, 9 U. OF CHI. L. REV. 477, 493, 494 (1942).

[52] 1 EMMETT C. YOKLEY, ZONING LAW AND PRACTICE 25, 26 (2d ed. 1953). However, use zoning was not upheld in New Jersey until after the constitution was amended, and in a few other states constitutional amendment was deemed desirable. EDWARD M. BASSETT, ZONING 17-19 (2d ed. 1940).

judicial testing of paricular zoning devices, however, seems to be a continuing task. This is due, in part, to the emergence of new types of zoning controls from the efforts of local governments to improve upon the early ordinances.

Classification schemes have been tested, and some have failed. Thus, for example, it has been held that churches cannot be excluded from residence districts,[53] or even subjected to general off-street parking requirements which would have the effect of preventing use of a lot for church purposes.[54] To so hold is to allow the problems generated by churches in residential neighborhoods—traffic congestion, traffic hazards, the cutting off of light and air, noise—to be overshadowed by an exaggerated concern for religious freedom. The exclusion of private schools from use districts in which public schools are permitted has been condemned.[55] Similarly, the Supreme Court of Illinois recently held void an ordinance permitting grade schools in an apartment district but excluding nursery schools.[56] On the other hand, the Supreme Court of New Jersey refused to disturb an ordinance creating a residential district which included high schools and grade schools, but from which colleges were excluded.[57] An off-street parking requirement for apartment houses was invalidated because it was thought to be discriminatory in that the ordinance contained no similar requirement for other structures, such as rooming houses and hotels, creating similar parking problems.[58] An ordinance excluding residences from industrial areas was held unreasonable and void, in so far as it was applicable to land suitable for residential use and not adapted to industrial uses.[59] Some attempts to exclude certain uses entirely from a municipality have failed,[60] while others have succeeded.[61] Such efforts are manifestations of the broader problem of governmental boundaries which do not correspond with appropriate planning boundaries. The worst aspect of this situation is the risk that the interests of persons who have no voice in the shaping of policy will be substantially affected. Judicial vigilance is therefore justified. But until regional planning is accomplished, the striking down of programs of the established governmental units may create planning vacuums.

In view of the trend in zoning ordinance revision in the direction of the creation

[53] Sherman v. Simms, 143 Tex. 115, 183 S.W.2d 415 (1944). For other cases in accord, see 2 YOKLEY, ZONING LAW AND PRACTICE, §222 (2d ed. 1953). Contra: Corporation of Latter Day Saints v. Porterville, 90 Cal. App.2d 656, 203 P.2d 823 (1949), *appeal dismissed*, 338 U.S. 805 (1949).

[54] Board of Zoning Appeals v. Jehovah's Witnesses, 117 N.E.2d 115 (Ind. Sup. Ct. 1954).

[55] State v. Northwestern Preparatory School, 228 Minn. 363, 37 N.W.2d 370 (1949). Contra: State *ex rel.* Wisconsin Lutheran High School Conference v. Sinar, 65 N.W.2d 43 (Wis. 1954).

[56] City of Chicago v. Sachs, 1 Ill. 2d 342, 115 N.E.2d 762 (1953). Since this ordinance was of the permissive type (*i.e.*, the uses listed for each district are permitted, not prohibited, uses), it is possible that the failure to mention nursery schools was inadvertent.

[57] Yanow v. Seven Oaks Park, 11 N.J. 341, 94 A.2d 482 (1953).

[58] Ronda Realty Corp. v. Lawton, 414 Ill. 313, 111 N.E.2d 310 (1953).

[59] Corthouts v. Newington, 140 Conn. 284, 99 A.2d 112 (1953).

[60] People *ex rel.* Trust Co. of Chicago v. Skokie, 408 Ill. 397, 97 N.E.2d 310 (1951) (drive-in theatres); Baris Lumber Co. v. Secaucus, 20 N.J. Super. 586, 90 A.2d 130 (1952) (storage and sale of used building materials, lumber, mason materials, plumbing materials, and heating materials). Both ordinances, however, appeared to have been aimed at the plans of particular enterprisers.

[61] Duffcon Concrete Products v. Cresskill, 1 N.J. 509, 64 A.2d 347 (1949) (all heavy industry).

of more and narrower districts,[62] a recent New York decision that a parking district (within which the only permitted uses were parking and storage of automobiles and operation of service stations) was invalid as applied is significant.[63] Although the narrow holding there was only that the classification of particular property was void, the decision seems to preclude the zoning of any property within a parking district if the surrounding land has business buildings upon it and if the property in question would be suitable for similar more intensive business uses—the very situation in which a parking district is needed. Some support for narrow districts is found in a recent California decision upholding a beach recreational district, within which the only permitted structures were lifeguard towers, wire fences, and small signs.[64]

Regulations which tend to encourage the establishment of exclusive residential districts—"economic segregation"—constitute one of the most controversial aspects of urban planning today. Criticism on this ground has been aimed at ordinances establishing minimum building cost, minimum height, architectural conformity, minimum cubic content of buildings, minimum floor area, and minimum lot area.[65] Attention has been focused recently upon requirements of minimum floor space for residences, which have been invalidated in Michigan and Pennsylvania, for lack of sufficient relation to the public health, safety, morals or general welfare,[66] but upheld in New Jersey and Texas.[67] When it has been urged that minimum standards of house size have a bearing upon health, especially mental health, by discouraging overcrowding, it has been pointed out by critics that the size of a house has no relation to the number of people who live in it, and that if overcrowding is to be prevented, control of occupancy is the solution. By way of rebuttal, advocates of this form of regulation assert that occupancy controls are impracticable.[68] To this writer, it seems that the police power ought to comprehend crude and unsuccessful programs as well as perfect and successful ones. Moreover, if the people of a community decide through democratic processes that attractive and expensive residential neighborhoods are to be promoted and preserved, it would be most improper for a court to set aside that decision in the name of "democracy" or "liberalism." There

[62] Babcock, *Classification and Segregation Among Zoning Districts*, 1954 U. OF ILL. LAW FORUM 186, 187.

[63] Vernon Park Realty v. Mount Vernon, 121 N.E.2d 517 (N.Y. 1954).

[64] McCarthy v. Manhattan Beach, 41 Cal.2d 897, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954).

[65] For collection and discussion of cases, see Note, *Zoning: Permissible Purposes*, 50 COL. L. REV. 202, 204-207 (1950). A three-acre minimum lot area requirement was upheld in Flora Realty & Investment Co. v. Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed*, 344 U.S. 802 (1952); and a five-acre requirement was approved in Fischer v. Bedminster, 11 N.J. 194, 93 A.2d 378 (1952).

[66] Hitchman v. Oakland, 329 Mich. 331, 45 N.W.2d 306 (1951) (which cites earlier Michigan cases in accord); Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954).

[67] Lionshead Lake, Inc. v. Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953); Thompson v. Carrollton, 211 S.W.2d 970 (Tex. Civ. App. 1948)

[68] The arguments on both sides are skillfully presented in Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV L. REV. 1051 (1953); Nolan and Horack, *How Small a House? —Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Williams, *Zoning and Housing Policies*, 10 J. HOUSING 94 (1953).

is no resemblance between the latest pronouncements of the United States Supreme Court on the scope of the police power and the statement by the Supreme Court of Pennsylvania in its opinion invalidating a minimum floor area requirement that "neither aesthetic reasons nor the conservation of property values or the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners. . . ."[69]

Retroactive zoning has incurred judicial disfavor. There are several instances of invalidation of ordinance provisions requiring termination of non-conforming uses which could not qualify as "nuisances."[70] Although prospective restrictions on use may cause a greater financial loss to landowners than retroactive limitations, the latter are apparently thought to be more severe. There are indications, however, that carefully drafted termination provisions allowing reasonable periods for "amortization" will be upheld.[71]

Community development programs, as well as regulatory activities, have also been subjected to constitutional attack. Since these programs are effected through exercises of the powers of eminent domain, taxation, and spending, they have had to satisfy the public purpose and public use requirements of state constitutions. Public housing for low-income groups was approved everywhere except in Ohio, where it was held that the properties of local housing authorities were not exempt from local property taxation because such properties were not "used exclusively for any public purpose."[72] The recent cases support the acquisition and operation of public parking lots, although a recent California case invalidated a municipal plan to turn over operation of such a facility to a private operator without reserving control over rates.[73] A multitude of other municipal enterprises have also been upheld.[74] The most important of the community development programs—urban redevelopment—involving the public acquisition, assembly, and redevelopment of sections of the community, has been upheld in nearly all states, Florida and Georgia being notable exceptions.[75] The courts in the latter two states were of the view that the vice of the programs was the ultimate sale or lease of the assembled land to private enterprisers. Their reasoning was surprising, to say the least. The Supreme Court of Florida asserted in apparent earnestness that if "the only purpose is to remove or abate a blighted area, the

[69] Appeal of Medinger, 377 Pa. 217, 226, 104 A.2d 118, 122 (1954).

[70] The leading case is Jones v. Los Angeles, 211 Cal. 304, 295 Pac. 14 (1930). Recent cases: Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953); Corpus Christi v. Allen, 152 Tex. 137, 254 S.W.2d 759 (1953).

[71] Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950); City of Los Angeles v. Gage, 127 Cal. App.2d 538, 274 P.2d 34 (1954); see Note, 67 HARV. L. REV. 1283 (1954).

[72] The cases are reviewed in Miner, *supra* note 27. The Ohio cases are criticized in McDougal and Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L. J. 42 (1942).

[73] City and County of San Francisco v. Ross, 270 P.2d 488 (Calif. App. 1954), which cites other cases on the subject at 491.

[74] See Comment, *Public Land Ownership*, 52 YALE L. J. 634, 641-644 (1943).

[75] The cases are collected in Papadinis v. Somerville, 121 N.E.2d 714, 717 (Mass. 1954).

police power is ample."[76] The Supreme Court of Georgia, when told that slums contribute to juvenile delinquency, retorted: "We think juvenile delinquency exists on both sides of the railroad tracks and, if this should be sufficient reason for the use of the power of eminent domain, some of the most exclusive sections of our cities could be razed to make room for industrial development."[77] In states where redevelopment laws have been upheld, new questions can be expected to arise from time to time as techniques are refined and improved. An advanced program in Illinois, the Illinois Urban Community Conservation Act of 1953, authorizing the redevelopment of "conservation areas" (*i.e.*, deteriorating urban areas which are likely to become slum and blighted areas), was recently upheld.[78]

In connection with public land acquisition, it should be noted that there are some decisions adverse to certain techniques for facilitating planning for future public land uses. While it is established that a city may prohibit the erection of buildings in mapped streets, and thereby minimize the cost of future condemnation,[79] the application of this technique to parks and playgrounds was held in a recent case to be a taking without just compensation.[80] Yet, if the city decides to condemn sites for future public uses long in advance of the time of contemplated use, it may be frustrated by constitutional or statutory requirements of "necessity," as in a recent Michigan case holding that condemnation of a school site which might not be used for thirty years was not necessary.[81]

C. Planning Decisions

The term "planning decisions" is used here to refer to applications of planning tools to particular situations, such as the inclusion of certain land within a certain zoning district (the zoning map), the rejection of a proposed subdivision plat or the redevelopment of a particular area. The invalidation of such decisions may leave the planning instrumentalities intact. However, judicial review may be so severe that the instrumentalities cease to be useful.

The need for vigilance by the judiciary is probably especially great here. The influence of special interests is perhaps more likely to affect particular planning decisions than the formulation of broad policies or the adoption of planning instrumentalities. It may also be true that the former are not usually preceded by as thorough study as the latter. Another factor bearing upon the determination of proper judicial review is the nature of the governmental entity whose action is to be reviewed. Nearly all planning decisions are made by governing bodies of local gov-

[76] Adams v. Housing Authority of Daytona Beach, 60 So.2d 663, 666 (Fla. 1952).

[77] Housing Authority of Atlanta v. Johnson, 209 Ga. 560, 563, 74 S.E.2d 891, 894 (1953).

[78] People *ex rel.* Gutknecht v. Chicago, 121 N.E.2d 791 (Ill. Sup. Ct. 1954); Zizook v. Maryland-Drexel Neighborhood Redevelopment Corporation, 121 N.E.2d 804 (Ill. Sup. Ct. 1954).

[79] Headley v. Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936).

[80] Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951). The use of zoning for the same purpose has also been disfavored, 2700 Irving Park Building Corp. v. Chicago, 395 Ill. 138, 69 N.E.2d 827 (1946).

[81] Board of Education v. Baczewski, 65 N.W.2d 810 (Mich. 1954). But cf. Carlor Co., Inc. v. Miami, 62 So.2d 897 (Fla. 1953), *cert. denied*, 346 U.S. 821 (1953).

ernments and citizen-staffed planning commissions, aided by expert staffs to an extent which varies widely among localities. While the same bodies also formulate broad policies and select planning tools, in doing so they are likely to rely upon the experiences of other localities and the research and recommendations of reputable private and public planning organizations. Some of the broad policy-making is done by the state legislature, usually in the form of enabling acts. These acts, having a broader political base and being more difficult to amend than local ordinances, are entitled to greater judicial respect.

Most of the adverse zoning cases are invalidations only of the ordinance as applied. These cases are numerous. In some states, particularly Illinois, judicial antipathy has been so pronounced that it may have caused serious damage to the zoning process.[82] Due to the infinite variety of fact situations presented in the cases and the vagueness of the rationalization in court opinions, generalization about them is difficult. However, it is apparent that many of the decisions are based upon extremely narrow conceptions of the zoning power. A fairly common characteristic of the cases is the emphasis upon reduction in the value of the land in question caused by the zoning map.[83] Yet, even substantial value declines for some tracts are inevitable consequences of zoning, as was recognized and sanctioned by the United States Supreme Court in *Euclid v. Ambler Realty Co.* Concern for this factor led the highest court of New York to insist recently upon the unbelievably strict criterion that zoning is void "whenever the zoning ordinance precludes the use of property for any purpose for which it is reasonably adapted."[84] If given general application, this criterion would make zoning impossible. A dissenting opinion in the New York case states more orthodox standards: a zoning ordinance is confiscatory only when it so restricts the use of property that it cannot be used for any reasonable purpose or when it restricts the property to a use for which it is not adapted. Even these standards may be too strict. They impede long-range planning when they are applied to land which is not presently, but may be in the future, adapted for uses permitted by its zoning classification. An example is an earlier New York case holding invalid residential classification of land in a largely undeveloped area on the ground that the property could not, then or in the immediate future, be used profitably for residential purposes.[85]

Perhaps some of the adverse decisions might have been avoided by more careful zoning. A common cause of judicial dissatisfaction is the adjacent location of use districts containing grossly incompatible uses, as where a zoning boundary separates

[82] See Babcock, *The Illinois Supreme Court and Zoning: A Study in Uncertainty*, 15 U. OF CHI. L. REV. 87 (1947).

[83] *E.g.*, Reschke v. Winnetka, 363 Ill. 478, 2 N.E.2d 718 (1936).

[84] Vernon Park Realty v. Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517, 519 (1954).

[85] Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). Conceivably, this case might have been decided differently had the city itself not been responsible in part for the factors making this land unsuitable for residential purposes, by maintaining an incinerator and open sewer in the vicinity.

residential and industrial districts.[86] Utilization of narrower and more numerous use districts, as well as mapping which provides gradual transition from highly restricted districts to slightly restricted districts, may alleviate this problem.

Unique problems are raised by zoning map amendments, as distinguished from the original mapping and re-mapping of large sections of the community. Typically, amendments are sought by property owners who desire to devote their property to a use not permitted in the use district within which the property has been placed, but who are unable to obtain variances or special exceptions from the zoning board of appeals. The courts are understandably chary of such changes, which may have been motivated more by concern for individual property owners than for the welfare of the community.[87] Some of the opinions come close to raising a presumption against their validity.[88] Undiscriminating application of such a presumption to all amendments would be unwise. The earlier mapping, probably having been done on a large scale, may not have taken into consideration adequately certain small areas. Unanticipated developments may have occurred. Indeed, failure to amend an originally valid mapping ordinance after a substantial change in conditions may result in an adjudication that it is now invalid.[89] Amendments initiated by planning commissions probably deserve greater deference than those proposed by interested landowners. Although the courts have not stressed the point, it would seem that they should be unusually suspicious of amendments adopted by the local governing body contrary to the recommendation by the planning commission.[90] In addition, the scope and throughness of the study and deliberation preceding the amendment are especially relevant factors for judicial review, although these also have been seldom stressed in the opinions. A step in the right direction was taken in a recent opinion basing the court's judgment invalidating an amendment, in part, upon the absence of findings or reasons by the planning commission and upon the fact that the "atmosphere of the proceeding was not conducive to calm deliberation," it having been shown that several "organized bus loads of angry property owners filled the hearing

[86] Reschke v. Winnetka, 363 Ill. 478, 2 N.E.2d 718 (1936) was such a case.

[87] Grant v. McCullough, 270 S.W.2d 317 (Tenn. 1954) is not atypical. There the court, invalidating an amendment changing the use classification of one lot, owned by an elderly widow with a dependent invalid son, from residential to commercial, said: "No basis for this action can be conjured other than that it emanated from a strong desire to help this good lady. . . . It was inconsistent with the general ordinance on the subject, and gave to Mrs. Grant a privilege withheld by the general law from others in a situation like unto that of Mrs. Grant." *Id.* at 319.

[88] Penning v. Owens, 65 N.W.2d 831 (Mich. 1954); Cresskill v. Dumont, 15 N.J. 238, 104 A.2d 441 (1954); Clifton Hills Realty Co. v. Cincinnati, 60 Ohio App. 443, 21 N.E.2d 993 (1938); Weaver v. Ham, 149 Tex. 309, 232 S.W.2d 704 (1950). But compare Keller v. Council Bluffs, 66 N.W.2d 113 (Iowa 1954), which upheld an amendment changing classification of three lots from A Residence to B Residence, thereby permitting a convalescent home, despite the facts that these lots were surrounded by A Residence District land, that there had been no change in conditions in the area since the previous zoning, and that the effect of the change was to sanction a previous non-conforming use which apparently had been illegal.

[89] Skalko v. Sunnyvale, 14 Cal.2d 213, 93 P.2d 93 (1939).

[90] Despite such circumstance, however, amendments were upheld in the following cases: Louisville v. Puritan Apartment Hotel Co., 264 S.W.2d 888 (Ky. 1954); Goddard v. Stowers, 272 S.W.2d 400 (Tex. Civ. App. 1954).

room, and frequently interrupted witnesses and counsel by booing and hissing, or applauding."[91]

CONCLUSION

It is difficult to measure the impact of the adverse state court decisions upon local planning. Although they are numerous and are accompanied by opinions severely circumscribing the range of planning action, many of the unfavorable decisions strike at aspects which could not fairly be deemed essential to effective planning. This is especially true of invalidations of particular planning decisions, such as the placing of certain land within a zoning district, which should be distinguished from invalidations of planning tools. The former, being peculiarly susceptible to improper pressures, should be subjected to close judicial scrutiny.

The role of the United States Supreme Court is much different from that of the state courts. It can do no more than pass upon the broader issues. It does not deserve strong criticism for its relatively passive role. When it has acted, it has nearly always given its approval to the planning programs which have come before it. In so far as state court decisions are based upon state constitutions, the United States Supreme Court is powerless to reverse them, of course. However, the Court may influence the attitudes of the state court judges, as it apparently did with its opinion in *Euclid v. Ambler Realty Co.* Perhaps the Court could now make a similar contribution by taking another case involving the zoning of particular land, as in *Nectow v. Cambridge.* In view of zoning experience since that decision, the Court might now be able to indicate more clearly the relevant criteria. It would also be helpful if the Court would speak up on the status of certain planning tools which some state courts have questioned, such as the termination of nonconforming uses. This writer would not criticize the Court for its failure to review and reverse state court decisions upholding planning devices regarded by some as accomplishing "economic segregation." There is no less reason for the Court to defer to legislative judgments on debatable issues of community planning than in the areas of business and labor. It does not follow that because "economic segregation" may lead to racial segregation, the former is entitled to the judicial antipathy accorded the latter. No doubt many economic and social policies of government affect unevenly various economic classes, and thus may bear more heavily upon some races than upon others, but an attempt to trace such relationships and make them determinative of the constitutionality of legislative programs would be to return to the approach of the pre-1937 Court.

[91] American University v. Prentiss, 113 F. Supp. 389, 392 (D.D.C. 1953), *aff'd,* 214 F.2d 282 (D.C.Cir. 1954). This case is one of the rare instances of amendment to place a tract in a more restrictive classification, at the request of neighbors. For elaboration of the thesis that in passing upon zoning the courts should place "greater emphasis upon the procedural aspects and upon the absence of political or neighborhood pressures," see Babcock, *supra* note 82 at 100-105.

ZONING FOR AESTHETIC OBJECTIVES: A REAPPRAISAL

J. J. DUKEMINIER, JR.*

Zoning for aesthetic objectives is a perplexing problem. According to traditional doctrine the community may not use the police power to accomplish primarily aesthetic objectives, but planners and lawyers have long had serious doubts whether in fact this doctrine *describes* what courts have done in the past in approving ordinances, whether it may be used to *predict* what they will do in the future, and whether it states a desirable *norm* for decision. The problem has been rather fully explored elsewhere along lines of traditional legal analysis,[1] and in view of the previous studies perhaps a more fruitful contribution can be made here by looking at the problem and the doctrine from a different perspective.

The primary object of this article will be to examine contemporary doctrine as an instrument of community policy and to focus attention upon its adequacy as an implement of the sound judicial skepticism from which it emanates. As will appear, the dearth of good empirical studies in the field of aesthetics seriously impedes the full consideration of many facets of the problem of zoning for aesthetic objectives, and the ideas and conclusions expressed herein are not comprehensively developed. Many of the ideas and conclusions also are tentative and subject to exception, although expressed without qualification. It is hoped, however, that this article will stimulate more thinking about the types of aesthetic control rational land planning requires, which is the basic issue.

THE EXISTING CONFUSION

The usual statement of doctrine is that the police power cannot be used to accomplish purely aesthetic[2] objectives, but that aesthetic objectives may be taken

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[1] A comprehensive technical analysis with a good collection of cases may be found in Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 So. CALIF. L. REV. 149 (1954). See also Donnelly, *The Police Power and Esthetic Zoning*, 5 J. B. A. KAN. 215 (1937); Gardner, *The Massachusetts Billboard Decision*, 49 HARV. L. REV. 869 (1936); Light, *Aesthetics in Zoning*, 14 MINN. L. REV. 109 (1930); Baker, *Aesthetic Zoning Regulations*, 25 MICH. L. REV. 124 (1926); Larremore, *Public Aesthetics*, 20 HARV. L. REV. 35 (1906). For a different doctrinal approach see Noel, *Unaesthetic Sights as Nuisances*, 25 CAN. L. Q. 17 (1939).

[2] The word "aesthetic" is many hued. It was first applied in Germany by Baumgarten in 1750 to appreciation and criticism of the beautiful. Next, Kant applied it to the "science" or "metaphysics" of sensuous perception. According to 1 OXFORD ENGLISH DICTIONARY 147 (1933), ". . . Baumgarten's use of *aesthetik* found popular acceptance, and appeared in England after 1830, though its adoption was long opposed. Recent extravagances in the adoption of a sentimental archaism as the ideal of beauty have still further removed *aesthetic* and its derivatives from their etymological and purely philosophical meaning." Although the Dictionary goes on to say Kant's meaning is now obsolete, F. S. C. Northrop

into consideration where for reasons of public health, safety or morals[3] the zoning regulation may be sustained as a proper exercise of the police power. In order to view this formulation in perspective it is necessary to make a short detour here into history.

Early in this century, community officials, responding to outraged popular sensibilities, began to take action against billboards and advertising posters which had in the eighteen nineties suddenly mushroomed on most every vacant lot. Ordinances and statutes were passed regulating, and in some instances entirely prohibiting, billboards. Most of these regulations were quickly killed by the courts which held that such regulations, having been enacted for aesthetic objectives alone, were without the scope of the police power.[4] Yet with the ever-widening desecration of the landscape and with the public outcry against billboards, it seems inevitable that the courts would not long restrain the community officials. And the courts did not.

The Missouri Supreme Court in 1911 in *St. Louis Gunning Advertising Co. v. St. Louis*[5] provided the doctrinal shift by taking the postulate that the police power might be exercised to protect community health, safety, and morals and then finding, as facts, that billboards[6]

> . . . endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants. They are also inartistic and unsightly. In cases of fire they often cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure and broad surface, render them liable to be blown down and to fall upon and injure those who may happen to be in their vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and dumping ground

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has recently resurrected and applied the word á la Kant; see THE MEETING OF EAST AND WEST c. 12 (1946).

The *Oxford English Dictionary* gives two current uses of the word (p. 148):

". . . . .

2. Of or pertaining to the appreciation or criticism of the beautiful.

3. Of persons, animals: Having or showing an appreciation of the beautiful or pleasing; tasteful, of refined taste. Of things: In accordance with the principles of good taste (or what is conventionally regarded as such)."

To these uses I append a qualification. In this article the only phenomena to which the word will be applied will be phenomena evident to sight only, not discernible by the other senses. To avoid confusion, however, I might point out that the word is essentially multiordinal and its meaning will vary herein with the context in which it is used.

[3] Sometimes *welfare* is added to *health, safety* or *morals*. Welfare would seem to give the courts a ready-made word to use when and if they openly recognize the aesthetic factor.

Caveat: some courts do not use the doctrine herein discussed. See *infra* notes 19, 55, 70.

[4] Ordinances held invalid in Crawford v. Topeka, 51 Kan. 756, 33 Pac. 476 (1893); People v. Green, 85 App. Div. 400, 83 N.Y.S. 460 (1st Dep't 1903); Bill Posting Sign Co. v. Atlantic City, 71 N.J.L. 72, 58 Atl. 342 (1904); Bryan v. Chester, 212 Pa. 259, 61 Atl. 894 (1905); Chicago v. Gunning System, 214 Ill. 628, 73 N.E. 1035 (1905); Passaic v. Paterson Bill Posting Co., 72 N.J.L. 285, 62 Atl. 267 (1905); State v. Whitlock, 149 N.C. 542, 63 S.E. 123 (1908); Varney & Green v. Williams, 155 Cal. 318, 100 Pac. 867 (1909); People *ex rel.* Wineburgh v. Murphy, 195 N.Y. 126, 88 N.E. 17 (1909); Curran Co. v. Denver, 47 Colo. 221, 107 Pac. 261 (1910); Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N.E. 920 (1911).

[5] 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913).

[6] 235 Mo. at 145, 137 S.W. at 942.

for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine, and air, which are so conducive to health and comfort.

The earlier cases had regarded aesthetic objectives as the predominating motive of billboard regulation and condemned the regulations for that reason; *St. Louis Gunning* initiated the deliquescence of earlier doctrine by regarding as primary the motives of safety, health, and morality and by sustaining the regulation for that reason.

From *St. Louis Gunning* and later cases following it emerged the postulates of contemporary doctrine:

(a) the police power may not be used to attain objectives primarily aesthetic; but

(b) the police power may be used to attain objectives primarily related to health, safety or morals;

based upon the following proposition of fact:

(a) billboards and signs are primarily deleterious to health, safety or morals. Strictly speaking, this proposition is an unproven hypothesis, and there is strong reason to suspect that it is contrary to fact in most contexts. It is important to determine if the underlying proposition of fact is true, for if it is not true and if in deed (if not in word) the courts sustain regulation of billboards, then it will have to be admitted that the doctrine is an inadequate description of the factors that move decision in this context of fact.

It seems plain that the primary offense of billboards is ugliness. Any jerry-built billboard may of course be a menace to safety and a fire hazard, but the billboard regulations are not limited to keeping the signboard screws tight. Limitations are placed upon size, positions, and frequency of placement. In some areas billboards have been entirely prohibited,[7] although the unsafe aspects might be easily obviated by proper construction requirements.

[7] COLO. STAT. ANN. c. 48, §403(4)-(7) (1953 Supp.). Prohibited within 500 feet of scenic parkway or within 250 feet of any historic monument, shrine, or similar object, or if obstructing any "scenic view" designated as such by the Secretary of State. Secretary may order removal of sign "unsightly by reason of lack of maintenance and repair."

CONN. GEN. STAT. REV. §4688 *et seq.* (1949). Prohibited within 100 feet of any public park, playground, cemetery or state forest, or within 15 feet of any highway.

DEL. CODE ANN. §1103 *et seq.* (1953). Prohibited within 25 feet of park, playground, school, church or highway.

FLA. STAT. ANN. c. 479.11(1) (1952). Prohibited within 100 feet of any public park, playground, school, church or cemetery.

IDAHO CODE §18-7017 (1947). Prohibited to paint or place advertising sign on any rock or similar natural object.

ME. REV. STAT. c. 20, §116 (1944). Prohibited within 300 feet of any public park, playground, school, church, cemetery or reservation, or within 50 feet of any highway.

MINN. STAT. ANN. §16.57 (1945). Prohibited within ⅛ mile of capitol.

NEV. COMP. LAWS §264 (Hillyer, 1929). Prohibited if signs "destroy the natural beauty of the scenery."

In business districts billboards and advertising signs have been prohibited unless the signs refer to business conducted or products sold on the premises. This provides a good illustration of the true objectives of community officials in acting against billboards and of the contrary-to-fact proposition of fact necessary under traditional doctrine to sustain this action. In the recent case of *Murphy, Inc. v. Westport*,[8] the plaintiff billboard company asked for an injunction restraining the enforcement of the provision in Westport's zoning ordinance which prohibited "Billboards or advertising signboards . . . in all business districts except as they refer to business conducted on the property on which the billboards stand." The object of the exception in this sweeping prohibition is to make community action more palatable to local shopkeepers who wish to advertise their wares (and who are also sometime voters). The provision strikes primarily at billboard companies which erect billboards on vacant lots. For a city wishing to rid itself of all billboards, it is an expedient compromise. The Superior Court granted an injunction on the ground that this classification was unreasonable and "illegally discriminative"; it found the regulations contained "no provisions as to size, construction or site designed to insure the safety of the public; . . . the advertising matter appearing on the sign determines its safety to the public. Of course this is nonsense."[9] It likewise dismissed the contention that the classification was reasonably related to public health or morals. The Connecticut Supreme Court of Errors reversed. It stated:[10]

> In the earlier cases, courts apparently did not realize as clearly as they do now, as the result of *facts* found upon various trials, that billboards may be a source of danger to travelers upon highways through insecure construction, that accumulations of debris

N. Y. CONSERVATION LAW §675 (McKinney, 1951). Prohibited within 500 feet of parks and parkways. N. Y. PUBLIC AUTHORITIES LAW §569-b. Prohibited within 500 feet of the Bronx-Whitestone bridge and the Brooklyn-Battery bridge [tunnel?].

N. C. GEN. STAT. §105-86 (1949). Prohibited within 200 feet of entrance to school, church, or public institution.

PA. STAT. ANN. tit. 36, §655.2 (Purdon, 1942). Prohibited within 500 feet of Rim Parkway.

S. D. CODE §28.0905 (1939). Prohibited within 300 feet of any cemetery.

VT. STAT. §7689 (1947). Prohibited within 300 feet of any park, playground or cemetery.

VA. CODE §33-317 (1950). Prohibited within 500 feet of parks, parkways, playgrounds, and cemeteries.

WEST VA. CODE ANN. §1721(57) (1949). Prohibited within 500 feet of any park, playground, school, church, or cemetery.

[8] 131 Conn. 292, 40 A.2d 177 (1944).

[9] Murphy, Inc. v. Westport, Record, Vol. A-201, p. 11. In surveying the history of billboard regulation, the Superior Court was refreshingly candid (at pp. 16, 11): "The earlier attitude appears to have been that billboard regulation was simon-pure aesthetic regulation and as such was condemned. Adverse public opinion against unsightly signs along highways quite probably had much to do in the rapid change of legal thought. This public opinion was not concerned with thoughts of safety, morals or welfare. It was occasioned by the disfigurement of the landscape and by the marring of the beauty of Nature. Yet the courts, somewhat sophistically, it seems to me, with many protestations against the use of aesthetic standards, urged with rather fantastic reasoning that what previously had no relationship to public safety had now developed into a public menace which an enlightened community not only had a right to regulate but, indeed, would be almost wayward in failing to control. . . . Billboard regulation is within the police power, regardless of whether one relies on the reasons to which the courts still cling or on those which are treated like step-children, but which, at least to my satisfaction, furnish the hidden impelling motive for modern legal thought."

[10] 131 Conn. 295, 297, 303, 40 A.2d 178, 179, 182.

behind and around them may increase fire hazards and produce unsanitary conditions, that they may obstruct the view of operators of automobiles on the highway and may distract their attention from their driving, that behind them nuisances and immoral acts are often committed, and that they may serve as places of concealment for the criminal. . . .

As far as the record shows, the trial court did not have before it any adequate basis of *facts* upon which to determine that the invalidity of the provisions of the ordinance in question had been established. If we were to sustain its decision, we would in effect be holding that, as a matter of law, the legislative body cannot, with such exceptions as are provided in the ordinance before us, constitutionally prohibit billboards in the business zones of any of our towns, no matter what may be the circumstances or justification which existed in the particular case. We cannot so hold.

. . . . .

As the trial court did not have before it sufficient *facts* to enable it to determine whether or not the plaintiffs were entitled to relief, we must remand the case for further proceedings. (italics supplied.)

What kind of *facts* did the court want the trial court to consider? *Facts* tending to prove that the prohibition of all signs except those advertising goods sold on the premises promoted public safety and lessened traffic hazards? The Superior Court considered and rejected such evidence. *Facts* showing that the prohibited billboards created a danger to public health? *Facts* showing that billboards in open fields increased the danger of fire more than signs attached to buildings? *Facts* showing that nasty things go on behind billboards and that they afford hiding places for criminals and cops? Except in rare, isolated cases such *facts* are simply unattainable. For instance, a special master in the next-door state of Massachusetts, where the factual contexts should be fairly similar, after hearing evidence for 114 days found:[11]

In some isolated cases, certain signs and billboards in this Commonwealth have been used as screens to commit nuisances, hide law breakers, and facilitate immoral practices. Around some few filth has been allowed to collect, and some have shut out light and air from dwelling places. In and around others, rubbish and combustible materials have been allowed to collect, which to some degree tends to create a fire hazard. Those instances were all so rare, compared with the total number of signs and billboards in existence, that I am unable to find upon the evidence that signs and billboards, in general, as erected and maintained in this Commonwealth, have screened nuisances, or created a danger to public health or morals, or facilitated immoral practices, or afforded a shelter for criminals, or created or increased the danger of fire, or hindered firemen in their work.

One of the more recent examples of community action against offensive advertising signs is the prohibition of signs overhanging the sidewalks in fashionable shopping areas. Although New York has long prohibited overhanging signs on Fifth Avenue, Park Avenue, and other East Side and downtown streets,[12] only re-

[11] General Outdoor Advertising Co. v. Dep't of Public Works, 289 Mass. 149, 170, 193 N.E. 799, 809 (1935), *appeal dismissed*, 297 U.S. 725 (1936).

[12] N. Y. CITY ADMINISTRATIVE CODE c. 26, §B26-7.0. The attractiveness of Fifth Avenue to a large extent may be credited to the Fifth Avenue Association, founded in 1907, which is a voluntary organization of merchants in the Fifth Avenue area that works closely with city officials in controlling the

cently have other cities become interested in achieving the Fifth Avenue "uncluttered look" on certain of their main business arteries. In two recent cases the ordinances of Detroit and Minneapolis prohibiting overhanging signs on fashionable Woodward and Nicollet Avenues respectively were upheld.[13] The city officials were pretty clearly not much concerned about safety, for if signs hanging from the best stores in town are really unsafe, reason demands that shabby ones hanging from stores in a low-price district also be prohibited. The practical result is that people who shop the best stores have aesthetic preferences which may be recognized and protected by community officials.

While it is difficult to determine what is the primary offense of much land use, the simulation of blindness affords a simple rule-of-thumb: if a use is offensive to persons with sight but not offensive to a blind man in a similar position, the use is *primarily* offensive aesthetically. Applying this rule to the regulation of outdoor advertising, it seems clear that except in certain areas where signs provide dangerous distraction to traffic their offense is primarily their unsightliness. Is a well-constructed billboard or overhanging sign inimical to a blind man's safety, health or morals? Does it offend him in any way? The function of advertising signs is visual solicitation, and their offensiveness would seem to lie in the fact that their assault on the eyes in some contexts is most unpleasant.

Where courts have allowed community officials to prohibit what are in reality aesthetically objectionable land uses, their *language* indicates that they have closed their eyes to the real underlying facts. Yet what courts *say* and what courts *do* are two different things, and it is not proper to conclude from their language that courts do not know what is going on. Except in so far as the doctrine ensnares the unwary planner or judge who puts excessive faith in the plain meaning of words, it does not prevent any court from *holding* that community officials may zone for aesthetic objectives. But it seems to me that the doctrine may properly be criticized as meaningless theory, *i.e.,* it does not describe past court response nor enable one to predict future court response. More will be said of this later. More important, and partly resulting from its aforementioned inefficacy, it appears to be an inadequate formulation of community objectives and an unnecessary hindrance to devising the most efficient means of achieving these objectives.

CLARIFICATION OF COMMUNITY OBJECTIVES

What are the community objectives here? They must be clarified if the inadequacy of contemporary doctrine is to become evident and courts are to function as they should. It is difficult to know how far back toward basic value premises

design of buildings and advertising signs. To encourage high standards of design the Association makes biennial architectural awards for the best façades on new and altered buildings. See Coffin, *beauty or bust,* Promenade, May, 1950.

[13] 1426 Woodward Avenue, Inc. v. Wolff, 312 Mich. 352, 20 N.W.2d 217 (1945); Oscar P. Gustafson v. Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1950). *Cf.* Preferred Tires v. Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (Sup. Ct. 1940); Mallory v. New Rochelle, 184 Misc. 66, 53 N.Y.S.2d 643 (Sup. Ct. 1944), *affirmed without opinion,* 295 N.Y. 712 (1946).

one must go in order to achieve the needed clarity. It is best perhaps to begin with some of what appear to me to be the merest truisms pertinent to the problem. These will sound very dogmatic, but I hope to elucidate and justify them in what will follow.

Among the strongest preferences of our society is for land use to be determined largely by private volition, and legal doctrine which implements this preference is a social hypothesis that goal values can more readily be achieved with a minimum of community intervention.[14] The *St. Louis Gunning* doctrine is such an hypothesis. Individuals using their land as they desire are expected to increase total community wealth, encourage self-respect, and foster healthier and more beautiful surroundings. Thus we prefer that community officials should not intervene in the allocation and planning of land use unless the privately determined use of land deprives other persons within the community of basic values, among which is the enjoyment of beauty by a wide number of people. Because the interests of particular individuals are not always compatible at the points of most intense reaction (*e.g.*, a particular land use, such as a billboard, which increases the wealth of one person may be to others aesthetically offensive in certain contexts), community officials must sometimes intervene to secure the maximization of all community values. According to our basic social hypothesis, this intervention should occur only when community values are *seriously* damaged or threatened by specific uses of land. It is for the purpose of achieving the optimum use of its resources and deciding when individual use seriously impedes this achievement, that the community establishes planning boards and courts which shape land use practises and attendant legal doctrines. Precisely under what conditions community values are seriously damaged by individual action is a problem which seldom or never admits of a simple answer, but the answer is more easily reached if it is kept in mind that the ultimate objective of the community is to secure a use of land which promotes the most values for the most people[15] and facilitates the harmonious functioning of residential, recreational, industrial and business areas.

Now it seems fairly clear that among the basic values of our communities, and of any society aboriginal or civilized, is beauty. Men are continuously engaged in its creation, pursuit, and possession; beauty, like wealth, is an object of strong human desire.[16] Men may use a beautiful object which they possess or control as a basis

[14] See MYRES S. MCDOUGAL AND DAVID HABER, PROPERTY, WEALTH, LAND 113 (1948), and sources cited therein at page 14.

[15] For development of a particular set of interdependent values, see Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

[16] "The fine arts . . . are by no means the only sphere in which men show their susceptibility to beauty. In all products of human industry we notice the keenness with which the eye is attracted to the mere appearance of things: great sacrifices of time and labour are made to it in the most vulgar manufactures; nor does man select his dwelling, his clothes, or his companions without reference to their effect on his aesthetic senses. Of late we have even learned that the forms of many animals are due to the survival by sexual selection to the colours and forms most attractive to the eye. There must therefore be in our nature a very radical and wide-spread tendency to observe beauty, and to value it. No account of the principles of the mind can be at all adequate that passes over so conspicuous a faculty."

for increasing their power or wealth or for effecting a desired distribution of any one or all of the other basic values of the community, and, conversely, men may use power and wealth in an attempt to produce a beautiful object or a use of land which is aesthetically satisfying. It is solely because of man's irrepressible aesthetic demands, for instance, that land with a view has always been more valuable for residential purposes than land without,[17] even though a house with a view intruding everywhere is said to be terribly hard to live in. Zoning regulations may, and often do, integrate aesthetics with a number of other community objectives, but it needs to be repeatedly emphasized that a healthful, safe and efficient community environment is not enough.[18] More thought must be given to appearances if communities are to be really desirable places in which to live.[19] Edmund Burke—no wild-eyed radical—said many years ago, "To make us love our country, our country ought to be lovely." It is still so today.

By assuming, however, that beauty is a matter neither subject to rational criticism nor capable of measurement by precise standards, courts say that although individuals may desire beauty, or, more accurately, what they think is beautiful, community officials *qua* officials should not be allowed to force their own individual "subjective," "non-measurable," "irrational" aesthetic preferences upon others through use of the police power. This demand for precise criteria by which "beauty" can be measured, which is at the bottom of the judicial refusal to recognize openly aesthetics as a proper police power purpose, seems to be based upon a misunderstanding of the meaning of words. In any event, it needs some looking in to.

This demand assumes that aesthetic inquiries must begin by asking for the meaning of "beauty" and that only if this meaning is discovered can we possibly

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THE SENSE OF BEAUTY, *Intro.* (1896), in I THE WORKS OF GEORGE SANTAYANA 5 (1936).

Some writers have suggested that judges are interested in achieving beauty in the syntax of legal doctrine. See Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. OF CHI. L. REV. 224 (1942); Wolfson, *Aesthetics in and About the Law*, 33 KY. L. REV. 33 (1944); Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COL. L. REV. 1259 (1947), and COURTS ON TRIAL 292 (1949).

[17] In Miller v. Lawler, 66 N.W.2d 267, 269 (Iowa, 1954), the court enjoined defendant from erecting a residence in violation of an alleged oral agreement that defendant would not erect a residence obstructing plaintiff's " 'terrific' nine mile view to the south and west across vacant property owned by defendant and to hills and woods beyond." The court held that to obstruct plaintiff's view would irreparably damage his property.

[18] See the essays of Weinberg, *Not by Bread Alone: An Evaluation of the Design Element in Large Scale Planning*, Gallion, *Civic Design and Democracy*, and DeMars, *Townscape and the Architect: Some Problems of the Urban Scene*, in COLEMAN WOODBURY (ED.), THE FUTURE OF CITIES AND URBAN REDEVELOPMENT 52-99 (1953).

[19] "The beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents, and it sustains in a general way the value of property in the neighborhood. It is therefore as much a matter of general welfare as is any other condition that fosters comfort or happiness, and consequent values generally of the property in the neighborhood. Why should not the police power avail, as well to suppress or prevent a nuisance committed by offending the sense of sight, as to suppress or prevent a nuisance committed by offending the sense of hearing, or the olfactory nerves? An eyesore in a neighborhood of residences might be as much a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise, or odor, or a menace to safety or health." State *ex rel.* Civello v. New Orleans, 154 La. 271, 97 So. 440, 444 (1923).

praise or condemn particular objects in our environment. Since beauty has in the past "proved notoriously refractory to definitive methods,"[20] it is easy to conclude that we cannot rationally appraise objects as beautiful. But by asking, "what is beauty?" courts have got themselves into the semantic bog which has long trapped the aestheticians, who too often start their intellectual meanderings in pursuit of that elusive will-o'-the-wisp: the true meaning of beauty.[21] This same bog lies in the field of jurisprudence, except that judges rarely decide cases by inquiring first, "what is justice?".

Words simply do not have the kind of meaning that judges (and philosophers) are seeking when they ask, "what is beauty?".[22] Words are neither "things" nor "ideas" that can be precisely measured; they have only uses or functions. The word beauty *means* nothing by itself. *To know the meaning of beauty is to know how to use it in an intelligible way to describe phenomena within a given context.* One can meaningfully say, for instance, that Corot's "The Forest of Fontainebleau" is a beautiful painting or that the cathedral at Chartres is a beautiful building, but it is fruitless to ask if either is a correct use of beautiful.[23] Philosophy has many revelations to offer but true meaning of word symbols is not among them.

That words have no single correct meaning points up that whether an object or a relation is beautiful (or "equitable" or "reasonable") hinges upon the perspective of the persons using the word.[24] This semantic indefiniteness does not, however, force us to the very extreme position of Humpty Dumpty (as some judges assume it does in matters of beauty but not in matters of equity or reasonableness). Of course, if a word cannot be intelligibly used by persons in communication then Humpty Dumpty is right, but there are good psychological and cultural reasons why the usage of words remains fairly stable,[25] why people can and do meaningfully use the word beautiful.[26]

What this adds up to is this. The cry for precise criteria might well be abandoned because it does not make sense. Beauty cannot be any more precisely defined than

[20] CHAS. K. OGDEN AND I. A. RICHARDS, THE MEANING OF MEANING 139 (1927).

[21] In general see KATHARINE E. GILBERT AND HELMUT KUHN, A HISTORY OF ESTHETICS (1940).

[22] A stimulating examination of the language of aestheticians can be found in ROBIN G. COLLINGWOOD, PRINCIPLES OF ART cc. I, II, 12 (1938). See also CHAS. K. OGDEN, I. A. RICHARDS AND J. E. WOOD, THE FOUNDATIONS OF AESTHETICS (1921); Morris, *Esthetics and the Theory of Signs*, 8 J. UNIFIED SCIENCE 131 (1939); McKeon, *The Philosophic Bases of Art and Criticism*, 41 MOD. PHILOLOGY 65 (1943).

[23] "Dogmatism in matters of taste has the same status as dogmatism in other spheres. It is initially justified by sincerity, being a systematic expression of a man's preference, but it becomes absurd when its basis in a particular disposition is ignored and it pretends to have an absolute or metaphysical scope." THE LIFE OF REASON, *Reason in Art*, c. 10, in IV THE WORKS OF GEORGE SANTAYANA 345 (Triton ed. 1936).

[24] An excellent exposition of the significance of perspective in aesthetic evaluations is the Gestaltist Hungerland's *Perception, Interpretation and Evaluation*, 10 J. AESTHETICS AND ART CRITICISM 223 (1952). See also note 33 *infra*.

[25] See generally P. A. SOROKIN, SOCIETY, CULTURE AND PERSONALITY: THEIR STRUCTURE AND DYNAMICS (1947), and LESLIE SPIER, A. T. HALLOWELL AND S. S. NEWMAN (EDS.), LANGUAGE, CULTURE AND PERSONALITY (1941).

[26] See Schrickel, *A Psycho-Anthropological Approach to Problems in Aesthetics*, 10 J. AESTHETICS AND ART CRITICISM 315 (1952).

wealth, property, malice, or a host of multiordinal words to which courts are accustomed. Planners can give *reasons* for saying a particular arrangement of objects in the environment is beautiful based upon perspectives common in high degree among the people in a community, but they cannot *prove* it, and proof which is strictly unattainable should not be demanded. What is needed to decide whether beautiful can be used in an intelligible manner by planners is not a foredoomed search for precise criteria for its correct employment, but rather a clarification of some of the operations indicating how the general public and planners use the word and an evaluation of these operations by reference to community goals. It will have to be admitted that a satisfactory set of operations describing what is beautiful in the varying contexts of land use is not easy to come by. The problem of contriving definitions that meet the operational test of meaning is a complicated, difficult business, for most of the relevant formal indices of beauty (such as symmetry, variety, uniformity, balance, rhythm, simplicity, intricacy, and quantity) will have to be further defined operationally.[27] It is easy enough for planners to say, "Let beauty represent the ratio of formal indices to function," but it is hard to know what, if anything, they would be talking about.

Furthermore, in specifying and evaluating indices of attractive environments, it is important that community decision-makers—judges and planning officials—realize that they must promote land use which in time will succeed in appealing to people in general. In public planning that environment is beautiful which deeply satisfies the public; practical success is of the greatest significance.[28] In the long run, what the people like and acclaim *as* beautiful provides the operational indices of what *is* beautiful so far as the community is concerned. All popular preferences will never be acceptable to connoisseurs who urge their own competence to prescribe what is *truly* beautiful, yet it seems inescapable that an individual's judgment of beauty cannot be normative for the community until it is backed with the force of community opinion. History may be of some comfort to the connoisseurs: widely acknowledged *great* artists and *beautiful* architectural styles produced popular movements and not cults.[29] A great age of architecture has not existed without the popular acceptance of a basic norm of design.

[27] On operational indices in general see P. W. BRIDGMAN, THE LOGIC OF MODERN PHYSICS (1927). For the development and application of a detailed set of aesthetic indices see GEORGE D. BIRKHOFF, AESTHETIC MEASURE (1933). Birkhoff takes as his basic formula of beauty the ratio of complexity to order. Complexity and order are refined psychologically and mathematically until specific formulae emerge which are applied to various objects and designs, such as a polygon in vertical position, a simple rectilinear ornament, and a vase. The results, although limited in scope, are closely in accord with long-range critical and popular preferences. An earlier unsuccessful attempt to specify operational indices is Hogarth's classic ANALYSIS OF BEAUTY (1753).

[28] See JOHN DEWEY, ART AS EXPERIENCE (1934). Compare with Dewey's pragmatics the transcendental approach of Croce, who condemns "as erroneous every theory which annexes the aesthetic activity to the practical." B. CROCE, AESTHETIC AS SCIENCE OF EXPRESSION AND GENERAL LINGUISTIC 50 (Ainslie transl. 1922).

[29] For divertissement, read John Wilcox's provocative account of how art without purpose and the art for art's sake craze culminating in the dada (hobby-horse) cult of the twenties grew out of a misinterpretation of Kant's *Critique of Judgment* (!) by Madame de Staël and others. Wilcox, *The Beginnings of L'Art Pour L'Art*, 11 J. AESTHETICS AND ART CRITICISM 360 (1953).

Planning attractive communities need not necessarily mean the uniform imposition of the dreary middle-brow tastes of the Philistines. To a large extent artistic preferences are a result of conditioning (not entirely, of course, since even the marvelously adaptive human machine cannot become accustomed to everything). Preferences are formed through what the psychologists call canalization, a type of conditioning which eventually narrows the kind of stimulus that can satisfy a non-specific demand. The demand will at first be rather general, but through environmental conditioning only one or two stimuli will bring satisfaction. Beauty, as one of the values sought by man, is one of his non-specific demands, and its satisfaction is conditioned by his environment. Objects in the individual's aesthetic continuum with which he identifies himself—to which he has become habituated—will more likely satisfy his demand than objects with which he is unfamiliar. Individuals do not like to impair the identifications of their personality structure, and for that reason resist new designs.[31] For the same reason, other changes in the environment are resisted. Nevertheless, lively perspicacious leadership in the arts, such as has been provided by the Bauhaus group, the Museum of Modern Art in New York, and other community art centers interested in improving contemporary design, can change—even "improve"—less educated "pedestrian" tastes (to use the jargon of art criticism). The real need is for those who want to influence community artistic preferences to examine, far more closely than has yet been done, the techniques by which contemporary aesthetic opinion is, and could be, manipulated.[32]

When an individual responds to environmental stimuli by applying the word beautiful to particular objects, an enormous number of variables has influenced the response. These include the specific qualities of the objects perceived (shapes, colors, textures, arrangements, compositions, etc.), the physical and social context of perception, the entire physical and psychological history of the individual, and the values of the percipient and of the community.[33] All these and infinitely more variables fuse into judgments of beauty. These judgments of beauty are like all other appraisals in that they are made by individuals. They will vary. There is no getting around the inherent limitations on man's power to reason which Kant

[31] There is an interesting discussion of this point in KURT KOFFKA'S PRINCIPLES OF GESTALT PSYCHOLOGY 347 (1935).

[32] For a lively history of the manipulation of American taste, see RUSSELL LYNES, THE TASTE-MAKERS (1954).

[33] As yet we have little good empirical description of the aesthetic evaluative process and of determining factors in it. Pertinent but limited studies include: Eysenck, *The General Factor in Aesthetic Judgements*, 31 BRIT. J. PSYCHOLOGY 94 (1940), and *Type Factors in Aesthetic Judgements*, *id.* at 262 (1941); Henry, *Art and Cultural Symbolism, A Psychological Study of Greeting Cards*, 6 J. AESTHETICS AND ART CRITICISM 36 (1947); Gordon, *Methodology in the Study of Art Evaluation*, 10 J. AESTHETICS AND ART CRITICISM 338 (1952). Perhaps the difficulty is that in order to get at the problem at all it is necessary to control the number of variables, resulting in a fatal oversimplification. This difficulty is experienced also by lawyers attempting to describe and weigh the factors in judicial decision.

"Experimental aesthetics," sometimes called "psychometric aesthetics," was a behavioristic approach emphasizing statistical studies of preference. Of it great things were expected, but little has come. See A. R. CHANDLER, BEAUTY AND HUMAN NATURE (1934); Farnsworth, *Psychology of Aesthetics*, in ENCYCLOPEDIA OF PSYCHOLOGY 12-25 (1946).

demonstrated so many years ago. Still, is it necessary to conclude that because individuals are not *perfect* judging machines that *imperfect but rational* evaluations of what land uses are conducive to an attractive community cannot and ought not to be made? It is a pity that aesthetic disagreements cannot be resolved by reference to absolute standards, for we should all feel so much more secure in our judgments. What we need, however, to solve a value problem is not an illusion of an absolute standard but decision-makers whose thinking is sufficiently disciplined and whose technical training and knowledge of human beings are sufficiently extensive to qualify them to pass judgment on the particular problem and to develop rational techniques for implementing our generalized, flexible, relativistic community values.

THE IMPLEMENTATION OF VALUES

Consideration of some specific land uses which have been widely thought to be aesthetically objectionable will show, perhaps, some types of aesthetic regulation rational community planning requires and how contemporary doctrine impedes the efficient implementation of community values. It will become apparent that the question of methodology of value implementation really needs far more extensive consideration than it has ever received in the past and far more than can be given it here. The following is intended to be more suggestive than comprehensive.

A. Control of Building Design

Many of the restrictions upon land use have, at one time or another, been said to be for aesthetic objectives. Indeed, many years ago it was thought by some that the main purpose of a city plan was to create a City Beautiful. Even today claims that building restrictions such as minimum lot size and minimum floor plan provisions have mainly an aesthetic purpose are not unusual, but here it would seem almost impossible to separate considerations of beauty from considerations of health, safety, and other factors.[84] Because these other objectives are so obviously involved courts have usually sustained reasonable minimum size provisions and have not recently struck down any provision of this type on the ground it was solely for an aesthetic purpose. If minimum size restrictions are without the police power, it is for some reason other than that their objective is aesthetic and thus a discussion of minimum size provisions is not directly pertinent here.

There are, none the less, certain community restrictions on land use which ruins the amenity of the neighborhood simply because it involves deviation from the neighborhood scheme and is considered unattractive. People expect and demand protection against deviations which they consider too ugly, and in new subdivisions protect themselves with private restrictive covenants,[85] but in the older areas reliance

[84] See discussion of the Wayne Township minimum size provisions and community objectives by Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953), and by Nolan and Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954), and reply by Haar, *id.* at 986.

[85] HAROLD L. REEVE, THE INFLUENCE OF THE METROPOLIS ON THE CONCEPTS, RULES AND INSTITUTIONS RELATING TO PROPERTY 114-124 (1954).

necessarily is to a large extent on the intervention of community officials. Examples of these aesthetically motivated restrictions are requirements of two-story houses,[36] of conformity to building line,[37] and of larger front yards in the quieter, more exclusive residential areas with the least traffic.[38]

Some cities with a distinctive architectural tradition have attempted to control the architectural design of buildings by establishing a public body to pass upon the design of private buildings. New Orleans,[39] Williamsburg,[40] Santa Barbara,[41] and West Palm Beach are examples. Apparently the only reported court test of an *ordinance* of this type involved the West Palm Beach one, and it was held void as not related to "health, welfare, safety or morals."[42] It is clear that restrictions on building design have aesthetic objectives in mind more than anything else; it also seems to me that in certain contexts such restrictions may be reasonable means of policy implementation.[43]

[36] Baker v. Somerville, 138 Neb. 466, 471, 293 N.W. 326, 328 (1940) (ordinance requiring two-stories held invalid; "it resulted alone from aesthetic standards of the city lawmakers"); Brookdale Homes v. Johnson, 123 N.J.L. 602, 10 A.2d 477 (1940) (ordinance requiring roof ridge to be at least 26 feet above foundation held invalid). *Cf.* 122 Main St. Corp. v. Brockton, 323 Mass. 646, 84 N.E.2d 13 (1949) (ordinance fixing minimum height for buildings in business area held invalid).

[37] Gorieb v. Fox, 274 U.S. 603 (1927) (ordinance sustained as reasonably related to public safety, health, morals or general welfare). *Cf.* St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269, 274 (1919) (ordinance requiring *billboard* conformity to building line sustained, Holmes, J., saying, "Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else"). See cases collected in EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §25.138 (1950).

[38] Sundeen v. Rogers, 83 N. H. 253, 141 Atl. 142 (1928) (ordinance requiring garages, pergolas, and other auxiliary buildings to be built behind main house sustained on ground it promoted public health and safety). *Cf. In re* Parker, 214 N.C. 51, 197 S.E. 706 (1938) (ordinance prescribing maximum height of 6 feet for walls or fence in rear of residence sustained in its application to plaintiff, although the city's superintendent of parks, a landscape architect, and plaintiff's neighbors all testified that because of the unusual topography of plaintiff's lot his wall was in no way aesthetically objectionable). See cases cited in MCQUILLIN, *op. cit. supra* note 37, §25.140.

[39] The Vieux Carré Commission, by virtue of the Louisiana Constitution, Art. XIV, §22A (adopted 1936), has control "over the architecture of private and semi-public buildings erected on or abutting the public streets of said Vieux Carré section. . . . [Without Commission approval no building can be erected or altered in] appearance, color, texture of materials and architectural design of the exterior. . . ." See New Orleans v. Pergament, 198 La. 852, 5 So.2d 129, 130 (1941); New Orleans v. Levy, 223 La. 14, 64 So.2d 798 (1953).

[40] Williamsburg, Virginia, Ordinance No. 21, §23-45 (adopted 1951), provides that any building erected "shall have such design and character as not to detract from the value and general harmony of design of buildings already existing in the surrounding area in which the building is located or is to be located."

[41] Santa Barbara, California, Ordinance No. 2228, §1 (adopted 1949).

[42] City of West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 30 So.2d 491, 492 (1947). The ordinance provided that "the completed appearance of every new building or structure must substantially equal that of the adjacent buildings or structures in said subdivision in appearance, square foot area and height."

[43] Caveat: "Because this is a new development, home builders are likely to feel that a provision for architectural supervision is an unreasonable imposition, and in cases where the planning agency has no expert architectural aid, this criticism will frequently be justified. . . .

"What success the California counties have had with this provision has been due largely to the discretion with which planning commissions have used the power granted. In every instance architects or other experts have guided the commission, and in virtually every case applicants for building permits whose plans did not meet the approval of the commission have been persuaded that the changes suggested were desirable. Without such careful and sparing use of the provision for architectural super-

Our communities need to achieve an environment that is emotionally satisfactory, that effects a reduction in purposeless nervous and physical tensions of the inhabitants. When the inner life of an individual is out of balance, anxiety occurs, expressing itself in a number of socially destructive ways.[44] Architecture, indeed every object in the individual's aesthetic continuum, has a direct effect upon the equilibrium of his personality and upon the happiness and richness of his life.[45] Community officials need to become more aware of the significance design holds for each individual and thus for society.

Zoning restrictions which implement a policy of neighborhood amenity should be voided, if at all, not because they are for aesthetic objectives but only because the restrictions are unreasonable devices of implementing community policy. Whether, I repeat, an ordinance of this type should be declared invalid should depend upon whether in the particular institutional context the restriction was an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community—and *not* upon whether the objectives were primarily aesthetic. It is obvious that the task of determining whether a restriction is arbitrary and unreasonable is not an easy one, but it certainly is not made easier by theory which turns a deaf ear to aesthetic effects. Before planners or courts can make a fully rational decision, they need to hear arguments as to the effect of a proposed decision on all community values. They need to know, *inter alia,* how the zoning ordinance will affect the distribution of community wealth, especially neighboring

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vision, the requirement would likely prove exceedingly dangerous." LEAGUE OF MINNESOTA MUNICIPALITIES, ZONING, A GUIDE FOR MINNESOTA CITIES AND VILLAGES 10-11 (1952).

[44] For examples, see the pamphlet of the Park Association of the City of New York, VANDALISM IN CITY PARKS (1952).

[45] Strictly speaking, although confirmed on occasion by individuals who have subjected their personality structure to depth study, this statement is common sense conjecture not based upon any empirical evidence of the *effect of the physical environment on personality.* After a fairly comprehensive search, I am unable to find any good study of this problem and my colleagues in sociology and psychology tell me none has been made. In his recent book, SURVIVAL THROUGH DESIGN 334 (1954), Richard Neutra suggests what is needed. He calls for a five-fold investigation:

> "1. To ascertain the force of *influences of environment affecting the organism generally,* not through the senses. Special consideration will be given to stimulations that are man-made or modifiable and therefore within the province of the art of design.
> 2. To clarify data on *specific sensory responses,* to show how the many senses work, singly and in 'stereognostic' combination.
> 3. To study the *relation of such sensory stimulation to an inner somatic equilibrium,* which is fundamental to our immediate well-being and our ultimate survival.
> 4. To study with care *conditioned and associated responses* elicited in our brain by *simple design elements.*
> 5. To investigate with ever-greater refinement and dependability the *interrelations of all responses,* their superpositions, their colligations, configurations, and mutual interferences."

Among the books which provide some insight into the problem are: THOMAS A. RYAN AND P. C. SMITH, PRINCIPLES OF INDUSTRIAL PSYCHOLOGY c. 12 (1954); CHARLES M. HARSH AND H. G. SCHRICKEL, PERSONALITY: DEVELOPMENT AND ASSESSMENT c. 1 (1950); DOUGLAS G. HARING (ED.), PERSONAL CHARACTER AND CULTURAL MILIEU (1949); L. B. MURPHY AND T. M. NEWCOMB, EXPERIMENTAL SOCIAL PSYCHOLOGY (1937); Morgan, *Human Engineering,* in WAYNE DENNIS (ED.), CURRENT TRENDS IN PSYCHOLOGY (1947); JAMES S. PLANT, PERSONALITY AND THE CULTURAL PATTERN Pt. II (1937); EDGAR SYDENSTRICKER, HEALTH AND ENVIRONMENT (1933); CHARLES W. VALENTINE, AN INTRODUCTION TO THE EXPERIMENTAL PSYCHOLOGY OF BEAUTY (1913).

property values on which taxes and the financial security of the city depend,[46] how the ordinance will affect the well-being of the community as a whole, including the effect upon physical and mental health and safety of the residents, and how the ordinance will increase the attractiveness of the community.[47] They need to know about matters which contemporary doctrine may exclude from evidence.[48]

Undoubtedly courts do take aesthetics into consideration by smuggling aesthetic effects into the judicial ken by a kind of "judicial notice" and evaluating them by a mysterious and very inarticulate intuition. But too often this results in a court being fooled by its own Gestalt; too often it results in a decision as to the reasonableness or unreasonableness of an ordinance without careful consideration of extrinsic evidence of its aesthetic effect. Are not the defects of a legal system in which words do not match action, in which the gap between myth and decision is great, many and patent?

B. Billboards, Gravel Pits, and Junk Yards

American prosperity owes much to advertising. It has played an important role in creating the widespread demand for more creature comforts resulting in more jobs, more volume for manufacturers and retailers, and, as Russell Davenport and the editors of *Fortune* put it, "The Permanent Revolution"[49] in the economic and social organization of American communities. We should be appropriately cautious about curtailing an activity which has been instrumental in increasing our wealth and effecting a wider sharing of it, but where it conflicts with another community value one has to give way. In the beginning, beauty was expendable, but the early billboards were in such profusion and in such vulgar taste[50] that courts finally had

[46] See Sayre, *Aesthetics and Property Values: Does Zoning Promote the Public Welfare?*, 35 A.B.A.J. 471 (1949).

[47] LEWIS MUMFORD, THE CULTURE OF CITIES (1938), CATHERINE BAUER, MODERN HOUSING (1934), and COLEMAN WOODBURY (ED.), THE FUTURE OF CITIES AND URBAN REDEVELOPMENT (1953) contain a wealth of information regarding the effect of community design upon the social, health and economic structure of communities here and abroad.

[48] *E.g.*, in Neef v. Springfield, 380 Ill. 275, 43 N.E.2d 947 (1942), the issue was the validity of a Springfield ordinance prohibiting gasoline filling stations on Monument Avenue leading to Lincoln's Tomb. The city officials "were permitted to testify . . . that their chief concern was the preservation of the beauty of the street." This testimony was dismissed by the Supreme Court of Illinois as "wholly immaterial and incompetent." "The question here," said the court (at page 950), "is whether or not, disregarding the evidence relating to the beauty of the neighborhood and the streets and other aesthetic purposes, the ordinance should be sustained on the grounds of public health, safety, morals or general welfare." The ordinance was ultimately sustained.

[49] RUSSELL W. DAVENPORT ET AL., U. S. A. THE PERMANENT REVOLUTION (1951).

[50] Many of the early posters could fairly be characterized as suggestive or lewd, and after much public pother these were subjected to the scrutiny of a censorship committee of the organized billposters. Like all censors they sometimes outdid themselves. In England, for instance, the pictorial representation by *Bovril* of an entire bull was condemned as likely to corrupt morals, and to this day only the bull's head is used by *Bovril*. Other posters likely "to be embellished by the lewd artistry of the street loafer" were ordered hung high. CYRIL SHELDON, A HISTORY OF POSTER ADVERTISING 70 (1937). See also CIVIC LEAGUE OF ST. LOUIS, BILLBOARD ADVERTISING IN ST. LOUIS (1910). The industry clean-up did not, however, satisfy civic leaders and nature lovers who continued to produce a host of amusingly vituperative pamphlets. Almost any city library will have a collection of these.

Public distaste for *billboards* became so strong that the term is now verboten in the advertising world. Modern husksters, scorning Shakespeare's dictum about a rose, insist that *billboard* has been

to allow their curtailment, even though the protection of property interests was at that time constitutionally in a preferred position. Today, most of the existing billboard blight is there by sufferance or inertia of community officials, since it is no longer doubted that billboards in a wide variety of institutional contexts may be regulated. By statute 17 states provide for comprehensive regulation,[51] and 16 states specifically provide for regulation by municipalities.[52] Practically every large city regulates outdoor advertising by ordinance or zoning law.[53] All of the recent cases indicate court approval of community intervention against billboards,[54] a few *lower* courts even *saying* as well as holding that the police power may be used to secure aesthetic objectives.[55] This victory over ugliness is undoubtedly due largely to the

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superseded by *poster panel* and *painted display bulletin*. One "spokesman" for the advertising trade in a 310 page textbook on outdoor advertising (HUGH E. AGNEW, OUTDOOR ADVERTISING (1938)) mentioned *billboard* only once, to say the term was obsolete, and the Director of the Westchester County (N.Y.) Department of Planning, in an appearance on a Philadelphia television station, was carefully told not to use the word *billboard* as it might offend some of the clients of the station. In spite of the billposters' efforts, the old-fashioned word remains firmly fixed in the vernacular.

[51] CAL. CODE, BUSINESS AND PROFESSIONS §5200 *et seq.* (Deering 1943, 1951 Supp.); COLO. STAT. ANN. c. 48, §403(1) *et seq.* (1953 Supp.); DEL. CODE ANN. §1101 *et seq.* (1953); D. C. CODE §1-231 (1951); FLA. STAT. ANN. c. 479 (1952); KY. REV. STAT. §147.080 (1953); ME. REV. STAT. c. 20, §111 *et seq.* (1944); MD. ANN. CODE art. 56, §208 *et seq.* (1951); MASS. GEN. LAWS c. 93, §§29-33 (Michie, 1951); NEV. COMP. LAWS §260 *et seq.* (Hillyer, 1929); N. J. STAT. ANN. §54:40-1 *et seq.* (1937); N. M. STAT. ANN. §58-708 *et seq.* (1941); N. C. GEN. STAT. §105-86 (1949); TENN. CODE ANN. §1248.14, §5753 *et seq.* (Williams, 1941); VT. STAT. §7676 *et seq.* (1947); VA. CODE §33-298 *et seq.* (1950); W. VA. CODE ANN. §1721(49) *et seq.* (1949).

[52] CAL. GOV'T CODE §38774 (Deering, 1943, 1951 Supp.); CONN. GEN. STAT. REV. §837 *et seq.* (1949); ILL. ANN. STAT. c. 24, §23-22 (Smith-Hurd, 1942); IOWA CODE ANN. §368.6 (1946); KAN. GEN. STAT. ANN. §§13-406, 14-431 (1949); MICH. STAT. ANN. §5.2082 (1949); MINN. STAT. ANN. §§411.40(8), 462.12, 463.13(4) (1945); MO. ANN. STAT. §§74.145(9), 75.110(42) (1949); N. Y. VILLAGE LAW §89(47) (McKinney, 1951); OHIO REV. CODE §715.27 (Page, 1953); R. I. GEN. LAWS c. 375 (1938); TEX. CIV. STAT. art. 1175 (24) (Vernon, 1953); UTAH CODE ANN. §10-8-39 (1953); VT. STAT. §3847 *et seq.* (1947); W. VA. CODE ANN. §591(83) (1949); WIS. STAT. §59.07(16) (1951).

[53] See CHARLES S. RHYNE, MUNICIPAL REGULATION OF SIGNS, BILLBOARDS, MARQUEES, CANOPIES, AWNINGS AND STREET CLOCKS, REP. NO. 137, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS (1952). Gannon, *The Law of Zoning Ordinances in Pennsylvania*, 16 U. PITT. L. REV. 168 (1955).

[54] Murphy v. Westport, *supra* note 8: General Outdoor Advertising Co. v. Dep't of Public Works, *supra* note 11; General Outdoor Advertising Co. v. Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930); Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932). Other cases are cited in McQUILLIN, *op. cit. supra* note 37, §§24.380-8. *But cf.* Mid-State Advertising Corp. v. Bond, 274 N.Y. 82, 8 N.E.2d 286 (1937).

[55] Commonwealth v. Trimmer, 53 Dauphin Co. Rep. 91, 105 (Pa. 1942): "We definitely hold . . . that aesthetic considerations alone, in this day, are sufficient upon which to base an exercise of the police power." Preferred Tires v. Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374, 376-377 (1940): "Plaintiff lays stress upon the claim that aesthetic considerations are the basis for the enactment of the ordinance in question and he quotes extensively from decisions in which the courts of this state have veered away from sustaining similar enactments for aesthetic reasons only. . . . This court . . . would not hesitate to sustain the legislation upon that ground alone. . . . Beauty tends to the happiness, contentment, comfort, prosperity and general welfare of our citizens. . . . The courts should not be so bound down with ancient precedent that they should close their eyes to every change." People v. Wolf, N.Y.L.J. Dec. 23, 1925, affirmed, 220 N.Y.S. 656 (1926), reversing 127 Misc. 382, 216 N.Y.S. 741 (1926), appeal dismissed, 247 N.Y. 189, 159 N.E. 906 (1928): "I am of the opinion that an ordinance prohibiting or regulating outdoor advertisements for the purpose of maintaining a certain aesthetic standard is valid if reasonable under the particular circumstances of the community in which it is to operate." The Massachusetts Supreme Judicial Court seems to be the only state court of last resort which has come out and said plainly that proscription of some billboards "rested solely on the grounds of taste and fitness" and which has held that on those grounds they may be regulated. General Outdoor Advertising Co. v. Dep't of Public Works, *supra* note 11, 289 Mass. at 199-201, 193 N.E. at 822-823.

growth of other more effective advertising mediums—newspapers, magazines, radio, and television—with a resultant lessening of demand by business interests for billboard space and community protection.

Although much has in fact been accomplished, there is still a considerable amount of confusion as to what community officials can and cannot do. Most courts have not yet openly recognized that a rational decision as to which signs should be protected and which prohibited in the interest of optimizing community values depends upon a number of variables, chief of which is the environmental context.[56] One of the principal reasons for the present confusion about what signs community officials can and cannot regulate is the failure of contemporary doctrine to make certain minimal contextual distinctions. The doctrine prohibiting zoning for aesthetic objectives applies both to advertising in areas devoted to residential and recreational functions and to advertising in manufacturing and retailing areas as if the context were not important in determining community policy and how to implement it. The doctrine fails to prescribe in what contexts advertising may be prohibited because not amenable to the environment.

Along with advertising signs are some other uses which in certain environments are entirely out of keeping. Among these are gravel pits and junk yards, which have been restricted by many communities. Ordinances prohibiting removal of topsoil and excavation of sand and gravel have been dealt with by several courts in the last 20 years. In New York, the ordinance of the town of Harrison, a wealthy commuters' community in Westchester County, prohibiting removal of top soil and excavation of sand, stone, and gravel was held to be an invalid exercise of the police power because solely for an aesthetic purpose,[57] but it is believed that on the basis of later cases[58] involving somewhat similar ordinances the holding in the *Town of Harrison* case is of doubtful authority. In Massachusetts, the Supreme Judicial Court, frankly recognizing the aesthetic factor, upheld a Burlington ordinance prohibiting stripping of topsoil on the ground that unsightly land depressed the taxable value of neighboring property.[59] It seems probable that other courts will

[56] In England outdoor advertisements may be prohibited *only* "in the interests of amenity and public safety." See the Town and Country Planning (Control of Advertisements) Regulations, 1948, Part II(4), S. I. 1948, No. 1613.

[57] Town of Harrison v. Sunny Ridge Builders, 170 Misc. 161, 8 N.Y.S.2d 632 (1938). *Cf.* Lizza & Sons v. Town of Hempstead, 175 Misc. 383, 23 N.Y.S.2d 811 (1940).

[58] Lizza & Sons v. Town of Hempstead, 69 N.Y.S.2d 296 (1947), *affirmed*, 272 App. Div. 921, 71 N.Y.S.2d 14 (2d Dep't 1947); Krantz v. Town of Amherst, 192 Misc. 812, 80 N.Y.S.2d 812 (1948); Burroughs Landscape Const. Co. v. Town of Oyster Bay, 186 Misc. 930, 61 N.Y.S.2d 123 (1946); People v. Gerus, 69 N.Y.S.2d 283 (1942); People v. Calvar Corp., 286 N.Y. 419, 36 N.E.2d 644 (1941).

[59] Burlington v. Dunn, 318 Mass. 216, 221, 61 N.E.2d 243, 246, *cert. denied*, 326 U.S. 739 (1945): ". . . The stripping of the top soil from a tract of land . . . leaves a desert area in which for a long period of time little or nothing will grow except weeds and brush. It permanently destroys the soil for agricultural use and commonly leaves the land almost valueless for any purpose. The effect of such an unsightly waste in a residential community can hardly be otherwise than permanently to depress values of other lands in the neighborhood and to render them less desirable for homes. . . . It is natural that a town of the character and situation of Burlington should endeavor to protect itself against such consequences." *Accord:* Billerica v. Quinn, 320 Mass. 687, 71 N.E.2d 235 (1947). Whenever courts talk about declining property values, it is, according to Norman Williams, Jr., Director of the

follow here the view of the Massachusetts court, which has the distinction of having written some of the most vigorous, realistic and illuminating opinions on the question of zoning for aesthetic objectives.[61] As for junk yards, there is little doubt that they may be kept out of residential areas. But may they be prohibited from locating in plain view of a well travelled highway? Two courts, reciting the traditional anti-aesthetic doctrine, have recently said not.[62] The problem of ugly junk yards in view of highways is similar to the problem of billboards on highways which still occasionally perplexes community officials trying to achieve attractive landscape design within the confines of contemporary doctrine.[63] There may be excellent reasons for promoting the aesthetic well-being of travellers on the highway;[64] the British Parliament has found junk yards on major public highways so objectionable that it has required that they be attractively fenced in. On the other hand, there may be no reasons. The point is, courts and planners need to hear arguments which they are not now hearing.

There are of course variables other than area function which are relevant in determining what is the most rational use of land. In areas in which outdoor advertising would seem perfectly amenable to the milieu, community officials may find other good reasons for intervention. Take the recent cases involving prohibition of overhanging signs in fashionable shopping areas.[65] This prohibition is far more difficult to justify in terms of area function than the prohibition of advertising signs in residential areas, but it has caused courts much less trouble. The courts have not resisted this phenomenon most probably because the community officials have

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Planning Division of the New York City Department of City Planning, "a safe bet that either an aesthetic or psychological nuisance is involved." *Deficiencies of Zoning and Legal Decisions,* PLANNING 164 (1950).

[61] The most famous, of course, is General Outdoor Advertising Co. v. Dep't of Public Works, *supra* note 11. This decision is discussed at length by Gardner, *supra* note 1. The doctrine of that case was extended in Lexington v. Govenar, 295 Mass. 1, 36, 3 N.E.2d 19, 22 (1936), to uphold prohibition of professional signs in residential districts: "Doubtless aesthetic considerations play a large part in determining that advertising signs should not be permitted in such an area—these would seem sufficient to exclude such a use." But *cf.* Barney & Casey Co. v. Milton, 324 Mass. 440, 87 N.E.2d 9 (1949).

[62] Vermont Salvage Corp. v. St. Johnsbury, 113 Vt. 341, 34 A.2d 188 (1943); Pfister v. Municipal Council of Clifton, 133 N.J.L. 148, 43 A. 2d 275 (1945). But cf. St. Louis v. Friedman, 358 Mo. 681, 216 S.W.2d 475 (1948).

[63] In Ellis v. Ohio Turnpike Commission, 162 Ohio St. 86, 120 N.E.2d 719 (1954), a Commission resolution prohibiting the owner of land taken for the turnpike to place upon his remaining lands "any billboard, sign, notice, poster, or other advertising device which would be *visible* from the travelway" was invalidated as *ultra vires* and, in addition, was found too vague and ambiguous for enforcement. By dictum the court said (at page 723) that with specific authority from the legislature the Commission might prohibit billboards "in the interests of safety and to insure an uncluttered view of the landscape." Compare Kelbro, Inc. v. Myrick, 113 Vt. 64, 30 A.2d 527 (1943), which held that the abutting landowner had no right ("easement appurtenant") to have his advertising signs seen from the highway unless they referred to business conducted on the premises. Also compare Perlmutter v. Greene, *supra* note 54, holding state highway superintendent might obliterate view of billboard by erecting blind in front of it on highway right-of-way. See Wilson, *Billboards and the Right to Be Seen from the Highway,* 30 GEO. L. J. 723 (1942).

[64] See the MARYLAND LEGISLATIVE COUNCIL RESEARCH REPORTS ON ROADSIDE CONTROL No. 5 (1940) and No. 20 (1942); Olds, *Billboards Along the Highways,* 26 MICH. S. B. J. 15 (1947).

[65] See note 13 *supra.*

acted here with merchant support, unlike the billboard cases, and a demand by hard-headed businessmen for beauty is very hard to resist.[66] With the burgeoning of convenient and attractive suburban shopping centers and the discovery that customer-pleasing locales draw customers, downtown businessmen have become more than ever alive to the need of making their stores attractive in appearance. The promotion of beauty has become good business. Business support of art has not even been entirely short-term self-seeking. Since the thirties, business has spent millions pioneering the field of industrial designing and millions more in the promotion of fine arts unrelated to industrial uses.[67] In the name of public relations, good design has become a major factor in the construction of the formerly drab and nondescript office building. For instance, Lever House (home of Swan, Lux, Rinso, Surf, Breeze, and Spry) was built on New York's Park Avenue with no first floor shops, usually a source of considerable calculable income, in order to benefit—incalculably—from public goodwill engendered by gazing upon a building which critics almost unanimously have praised with superlatives. No city today is without some building undergoing a face-lifting—not because the old façade needs repair but because it is ugly. Although this marriage of business and beauty is one of convenience and may be severed at any time, if the coupling brings about open recognition of the value of an attractive community, it will help secure more rational land planning and thereby the achievement of more attractive communities.

CONCLUSION

If we want our children to grow up in pleasant purlieus, we must give up something of the freedom of the individual to use his land as he chooses. This is inherent in the concept of land planning by community officials. Nevertheless, I do not wish to leave the impression that I think it either necessary or desirable that community officials be arbiters in all questions of aesthetic preference which crop up from the use of land. According to our basic social hypothesis, they should interfere only when individual use seriously hampers the achievement of community goals. If community officials instigate an artistic inquisition, it is certainly the court's duty to oppose it, but the cases do not suggest that community officials have acted rashly in attempting to improve appearances. In fact, they seem to have lagged far behind public execration of eyesores,[68] and when they have acted ex-

[66] On this latter point it is interesting to compare the *dictum* in Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So.2d 364, 367 (1941) ("It is difficult to see how the success of Miami Beach could continue if its aesthetic appeal were ignored because the beauty of the community is a distinct lure to the winter traveler") with the *holding* of the Florida court invalidating the West Palm Beach architectural control ordinance, *supra* note 42.

[67] "The Museum of Modern Art, for example, has fifty 'Corporate Members' who pay up to $1000 a year. The list includes such firms as Monsanto Chemical, I.B.M., Yale & Towne, Lord & Taylor, and the Columbia Broadcasting System." RUSSELL LYNES, THE TASTE-MAKERS 299 (1954).

[68] So far, in fact, that the people of Santa Fe recently had to demonstrate the once fabled "law west of the Pecos." According to the Santa Fe New Mexican of April 4, 1949, "The wind or the snow or something smashed down three large billboards and six smaller ones along the road between Pojoaque and the Otawi bridge last night. The big commercial boards were leveled as though cut by saws. Two of the large signs had advertised whisky brands. The felling of the signs followed similar acci-

tensive damage to community values has usually already been done. It is a pity, but it is not entirely their fault. Without frank judicial acceptance of beauty as a proper community objective attainable through use of the police power, the maximization of all community values is impossible and ordinances attempting to prevent eyesores generally become makeshift and piecemeal devices.

Zoning doctrine is still in its formative period; the complexion of our landscape for a long time in the future will be determined by our present attitudes toward zoning for aesthetic objectives.[69] It seems to me that something more is needed than a case-by-case exception to the general rule, something approaching more closely to a systematic theory of planning which will cover the presently widely accepted doctrines as well as develop new ones to replace those which are now causing us trouble. A tabulation of differentiated factual situations in which restrictions were judicially approved gives community officials a more penetrating insight into the non-meaningfulness of our contemporary authoritative doctrine about aesthetics, but if we would have anything approaching a scientific method in law, we need a body of meaningful postulates and propositions, the efficacy of which is verifiable by case results and evaluated by community goals. Those courts which postulate that the police power may not be exercised for aesthetic objectives obscure the goals toward which community policy is directed[70] and hinder a determination of what types of aesthetic regulation are required by rational community planning. An effective doctrine for aesthetic zoning may, probably should, provide for careful judicial supervision of the exercise of planning powers in this field. But whatever norm is adopted ought to be based upon an adequate recognition and description of the real factors which motivate decisions of planning boards and courts.

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dents to other boards set up in the locality where residents have taken a particular pride in the natural scenery." The newspaper editorially deprecated this "lawlessness" but pointed out that "until there is legal control of billboards, property owners and nature lovers will continue to handle the situation with any means at hand."

[69] In connection with the effect of doctrine upon the pattern of land use, Judge Jerome Frank suggests that the growth of skyscrapers in this country has been materially aided by the doctrine that easements of light and air may not be acquired by prescription (see Parker & Edgarton v. Foote, 19 Wend. (N.Y.) 309 (1838); Depner v. U. S. Nat. Bank, 202 Wis. 405, 232 N.W. 851 (1930); Lynch v. Hill, 24 Del. Ch. 86, 6 A.2d 614 (1939); Maioriello v. Arlotta, 364 Pa. 557, 73 A.2d 374 (1950); Kulbitsky v. Zimmoch, 77 A.2d 14 (Md. 1950). In England the doctrine is to the contrary. Lemaitre v. Davis, 19 Ch. D. 281 (1881). In a recent letter (dated Dec. 8, 1954) to the author, Judge Frank states: "Had the English rule been accepted here, no one could have built a skyscraper in a large city without buying up the easements of adjacent owners. Perhaps such purchases would have been made. But the existence of such easements, and the expense involved in purchasing them, might well have created an inertia sufficient to impede, at least, the development of those beautiful monstrosities."

[70] Note the frank recognition of aesthetics by Mr. Justice Douglas in Berman v. Parker, 348 U.S. 26, 33 (1954): "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." Although eminent domain was involved here, the implications of the language seem very wide. The case may well provide the needed watershed in the field of aesthetic zoning.

THE RELATIONSHIP OF ZONING TO TRAFFIC-GENERATORS

ALLEN FONOROFF*

Traffic like the weather is a very popular topic of conversation or profanity. But unlike the weather, steps are being taken to do something about it.

The problems that vehicular and pedestrian traffic create are among the most perplexing daily problems facing a community and its people. Technological advances in the automotive industry have made the automobile available to millions of people, and the number of car owners grows larger each year. Trucking has become a major industry competing with rail and air for the movement of goods and materials. The streets and highways are jammed with cars and trucks fighting to move from place to place. This is a common scene familiar to all urban communities.

The most frequent question asked is what can be done to alleviate the congestion of vehicles and people. Before an answer to this question is attempted, it is more important to know the causes of the congestion. Obviously it is not enough to say that motor vehicles cause traffic problems, since our modern society could not very long exist without these vehicles. Traffic problems exist because of the relationship between the streets and the use of lands abutting the streets. The solution to the problems created by the congestion of motor vehicles does not lie alone in the more efficient use of streets or movement of vehicles. Nor will the entire answer be found in off-street parking lots, off-street loading berths, or mass transportation. A recognition of the relationship between streets, traffic, and land use is essential before any solution can be attempted. Herein lies the job of the city planner.

This critical relationship is one of the most important factors that a planner will consider before proposing use districts and zoning regulations for a community. Although this statement may be accepted as a matter of fact, zoning regulations are, more often than not, taken for granted. Unfortunately very few people stop to consider the various elements that go into the planning and zoning of a community. The traffic-generating capacity of the many different uses of land and buildings is of primary importance in establishing the various zoning use districts. A more obvious example is the recent inclusion in many zoning ordinances of provisions requiring off-street parking spaces and off-street loading berths. The relative degree of traffic-generation has been the determining or influencing factor in the inclusion

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or exclusion of certain uses of land or buildings from the various use districts of a community: for example, the exclusion of high density apartments from one and two-family dwelling-house districts; the exclusion of commercial establishments from all residence districts; the exclusion of warehouses and manufacturing operations from retail districts; the exclusion of heavy industrial use from residence-industry districts; the exclusion of hospitals and other community facilities from one and two-family dwelling-house districts.

These examples indicate the basic and specific situations in which the problem is raised, and how important the traffic generating capacity of the use of land and buildings is to planning and zoning.

Our courts have dealt with hundreds of cases involving the practice of zoning. Have the courts, in dealing with zoning regulations, recognized and shown any understanding of the traffic-generating capacity problems so inherent in planning and zoning? That is the point of this article.

THE PURPOSE OF LAND USE CLASSIFICATION

Zoning is the legal process by which a community is divided into zones or districts for the purpose of controlling the use of land and buildings, the size of buildings, and their location on a lot. Zoning regulations—use and bulk—vary as between different districts of a community since the character and function of the several districts differ. This exercise of the police power should be in accordance with a comprehensive land-use development plan embracing the entire community. Zoning is the legal means available to promote an orderly development of a community, or, as is more often the situation, an attempt to bring a semblance of order out of existing chaotic development.

The first comprehensive zoning ordinance in the United States was adopted by New York City in 1916. Traffic generation was not absent from the minds of the framers and promoters of this adventure. It was apparent to them that the trucking serving the garment industry at that time had almost rendered valueless the existing specialty retail area. The Fifth Avenue Association exerted much pressure to keep the garment industry below 34th Street. Thus one of the major inspirations for zoning New York City was to protect the city against the deterioration caused by misplaced uses and their resulting traffic. Since that time thousands of municipalities have adopted zoning regulations. The modern ordinances reflect the tremendous change in thinking by planners. New techniques of land development and new methods of control have evolved.

In the early days of zoning, vehicular traffic created very few problems, but it has grown to a point where today it dominates the thinking of city planners. This is seen in the greater emphasis on bulk regulations, provisions for off-street parking and loading, and the creation of new types of use districts.

It is almost impossible to talk about zoning without talking about traffic and transportation. Through zoning, a community may control the density of its pop-

ulation, and the location of its various businesses, industries, parks, playgrounds, and other community facilities. Many standards and principles are employed in determining the proper methods of control. It is not difficult to see that one of the prime principles of planning and zoning is traffic-generation. Undoubtedly a combination of height and high density of the land, plus an active business operation on the land, will overcrowd adjacent streets. Under such circumstances, it is virtually impossible for people or goods to move from place to place.

Different types of land uses and the different height and bulk of buildings create definite kinds and amounts of traffic. It is important to spell this out carefully.

It has been firmly established that there is a close relationship between the use of land and buildings, including their height and bulk, and the streets which they abut.[1] The streets and sidewalks will only accommodate a certain number of people and vehicles, depending of course on their physical capacity. Therefore the more intense the use of the land, the greater the height and bulk of the buildings, the more intense is the use of the streets. Thus it becomes clear that a limitation on building height and bulk and a selection of appropriate uses will proportionately reduce the congestion of people and vehicles on the streets. Naturally, traffic density will differ as to kind and amount with different types of neighborhoods. For example, the traffic picture is quite different between and within residential, commercial, and industrial districts.

The design and layout of the street system of a new community, to a large extent, fixes the character of the use of the lands fronting on the street. In new communities, a functional street pattern can reinforce the effectiveness of a zoning ordinance. A residentially zoned area can be better protected and preserved when the street layout functions to exclude through automobile and truck traffic. In the older and more developed communities, methods are constantly being sought which will lessen if not eliminate through traffic and truck traffic.[2]

The reason for this protection of the people and the preservation of the zoning classification is not, contrary to most of the earlier decisions,[3] to preserve property values, but—more important—to protect the people living within the area against undue traffic hazards and to lessen the noise and confusion caused by cars and trucks.

[1] Lewis, *Highway Traffic*, III REGIONAL SURVEY OF NEW YORK AND ITS ENVIRONS 100-101 (1927); ROBERT B. MITCHELL AND CHESTER RAPKIN, URBAN TRAFFIC: A FUNCTION OF LAND USE (INSTITUTE FOR URBAN LAND USE AND HOUSING STUDIES, 1954); ZONING AND TRAFFIC (ENO FOUNDATION, 1952).

[2] Bagby, *Protecting Good Neighborhoods From Through Traffic Decline*, 8 TRAFFIC QUARTERLY 410-422 (1954).

[3] Village of Western Springs v. Bernhagen, 326 Ill. 100, 156 N.E. 753 (1927) (the village zoning ordinance included most of the area in a single family use district; the court upheld the ordinance as a reasonable exercise of the police power since the erection of a filling station on one of the village streets would depreciate residential property values); Bianchi v. Comm'rs of Public Buildings, 279 Mass. 136, 181 N.E. 120 (1932); Koch v. City of Toledo, 37 F.2d 336 (6th Cir. 1930); Morris v. East Cleveland, 22 Ohio N.P. (N.S.) 549, 31 Ohio Dec. 98, 197 (1920); De Lano v. City of Tulsa, 26 F.2d 640 (8th Cir. 1928).

The importance of a street system—its design and location—to the well-being of a community cannot be over-emphasized. Depending upon the traffic-generating capacity of the land uses that abut the streets, a street system, if properly located and designed, will permit people and goods to move freely from one point to another. On the other hand, where a street system, designed and laid out for horse-and-carriage traffic, is now lined with skyscraper office buildings or large manufacturing establishments or high bulk apartment buildings, such a system cannot function properly. The congestion of people and motor vehicles almost throttles movement. Functioning as they do as channels of transportation and communication, the streets are indispensable to the operation of a community. It is, therefore, the traffic-generating capacity of the abutting land uses that will determine the success or failure of a street system and the efficient operation of a community. That is why it is so important that use classifications be made to minimize congestion and thus to protect the safety of the people and their physical as well as monetary investment in a community. In order to avoid unsafe and uneconomic congestion of vehicles, a scheme must be developed that will balance the use of land and buildings, their height and bulk, and the capacity of the streets and highways.

Different types of commercial buildings, for example, put varying loads on the land and generate varying degrees of traffic. To illustrate this statement, Mr. Ernest P. Goodrich[4] pointed out that the streets of a community have definite limits, and it is therefore important to limit the land load in order to avoid congestion. Mr. Goodrich referred to the studies of the Regional Survey of New York that revealed the average quantity of traffic created by certain types of uses:

0.2 vehicle per day per family for deliveries, including building material, groceries, and so forth;
0.85 vehicle per family, according to the automobile registration statistics given in the United States Statistical Abstract, 1928;
therefore, $0.2 + (0.85 \times 2) = 1.9$ vehicles per family is the total traffic per family per day;
6.0 vehicles per day per foot of a 100-foot lot in industrial sections;
1.0 vehicles per day per foot of frontage in business districts;
0.5 vehicle per day per foot of frontage in loft building districts;
4.0 vehicles per day per foot of frontage in theater districts;
0.5 vehicle per day per foot of frontage per story for department stores; or
1.0 vehicle per day per 165 square feet of floor space for department stores;
1.0 vehicle per day per foot of frontage for hotels (transients only).

As a part of its monograph on Highway Traffic,[5] the Committee on Regional Plan of New York and Its Environs undertook a careful study of the relation between vehicular traffic and the height and bulk of buildings in the borough of Manhattan. That study showed that the existing streets could not possibly accommodate

[4] Goodrich, *Controlling the Load on Land Through Zoning*, 155 THE ANNALS 166, 168, Pt. 2 (May, 1931).

[5] III REGIONAL SURVEY OF NEW YORK AND ITS ENVIRONS, *op. cit. supra* note 1, Appendix *C*, at 143-149.

the buildings that might be erected under the permissible height and area regulations. It was pointed out that building heights had to be kept below the legal limit in order to have a functioning street system. This conclusion was reached in 1927 and is more true today. In the past twenty-seven years the zoning and building errors have been compounded. It does not take a planner or traffic engineer to realize the complexity of the problem and the almost hopeless situation that faces New York City.

Because of the interrelationship of land use, building height and bulk, and the street system, it is important to recognize that a change in land use will to some degree affect the character and volume of traffic. The reverse is also true: a change in the character and volume of traffic will affect the way in which land and buildings are used.

ZONING REGULATIONS AS APPLIED TO TRAFFIC

It has already been pointed out that zoning provides a very basic and important tool to deal with the traffic-generating capacity of the various uses of land and buildings. Zoning regulations have much to do with the physical development of a community. Zoning promotes a certain stability by providing locations for various uses within well-planned and functional use districts. This control, potential or real, over use and bulk allows a community to take steps toward the relief, and wherever possible, the elimination or prevention of vehicular and pedestrian congestion. The possibilities that zoning has offered are no longer dreams since its constitutionality has been so well established.[6]

Through zoning it is possible to put into execution a plan for a community which may and should include a street plan that will serve the various zoning districts. Relying upon the stabilizing influence of zoning, a street plan can provide for the efficient and convenient movement of people and goods. Fast-moving through traffic will be separated from slow-moving local traffic. Some phases of modern business require a certain amount of concentration. However, efficient operation does not require all the floor space to be confined to a series of skyscrapers. Thus traffic-generating uses will be dispersed within well-defined economic units that will utilize existing streets with a minimum of congestion.

Zoning regulations can slow down and, in some situations, stop the deterioration of a neighborhood resulting from the overloading of existing narrow streets that cannot be improved to increase the traffic flow. Some of the results of careful planning and zoning are the opening up of the streets for safe and efficient movement of vehicular and pedestrian traffic; the reduction and perhaps elimination of accidents; and the removal of through-traffic from local streets.

These results are generally accomplished by specific use and bulk provisions in a zoning ordinance. As for use regulations, the following have a direct bearing on traffic and tend to alleviate the problems brought on by congestion:

[6] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

1. Mapping of the zoning use districts. This permits the orderly growth and development of a community within districts preserved for specific uses—residential, commercial and retail, and industrial.
2. Classification of uses to be permitted in the various use districts. Traffic-generators are so located as to do the least harm to the community. Incompatible uses are separated and permitted to locate with other similar uses where the street system is more adequate.
3. Provisions for the elimination of non-conforming uses. In addition to the nuisances created by these uses which do not conform in character to the other uses in the district, non-conforming uses create traffic conditions inimicable to the surrounding area.
4. Requirements for off-street parking. The taking of vehicles off the street removes these obstacles to traffic movement.
5. Requirements for off-street loading and unloading. Similarly, the removal of trucks from the curb will permit the entire pavement of a street to be used for through traffic.
6. Provisions for corner sight clearance. By prohibiting for a certain distance from the curb the obstruction of corners with structures, trees, hedges, and the like, the intersections are kept visually open to permit a safer and faster movement of vehicles and pedestrians.

These are perhaps the most important, although not all, of the zoning use regulations that have a direct effect on traffic.

There are many bulk controls found in zoning regulations that are directly related to minimizing the problems created by the traffic-generating capacity of the use of land and buildings. Among the most important are the following:

1. Regulation of building bulk and height. The overcrowding of the land with building and the resultant overcrowding of the streets is avoided by such controls.
2. Regulations limiting the density of population. This type of control is extremely significant. By limiting the number of familes that may dwell within a particular area, pedestrian traffic is reduced and possible congestion is avoided. Furthermore, the number of vehicles—buses, trolleys, delivery trucks, and automobiles—needed to serve such an area is proportionately reduced.
3. Provisions requiring front, rear, and side yards. Such requirements may provide adequate space for the parking of vehicles off the street.

The use and bulk regulations enumerated above will be discussed in more detail as they are applied to specific situations in another part of this article.

The early discussions of zoning and zoning law laid great stress on the protection of residential areas and the preservation of property values. Whether or not

this emphasis is correct is not the concern of this article. However, the desire to preserve the residential areas from the invasion of commercial and industrial uses found fulfillment in comprehensive zoning. The home owner or tenant was concerned not only with the potential physical nuisances associated with business and industry, but also with the additional traffic these uses would bring onto his street, thereby increasing the danger to his children and disrupting his peace and quiet.

At this point it would be well to consider the traffic element as it is applied to the formation of the various zoning use districts and the uses that are permitted to occupy the land. The discussion will be limted to the following situations:

1. The allocation of land for the various uses that operate within a community.
2. The exclusion of certain uses from residence districts.
3. The selection of certain types of uses in residence-industry districts.
4. The exclusion of certain uses from local retail, general retail, and light industrial districts.
5. The separation of incompatible land uses.

1. *Mapping the Zoning Districts.* One of the most important steps in planning a community is the allocation of land for the many different types of uses of land and buildings that will operate within a community. The planner must attempt to estimate the future needs of the community and allow sufficient land area for expansion. He must also try to select the best physical location for the several zoning use districts. The relationship of one use district to another, and the relationship of each type of use district to the physical features of the land—waterways, highways, rail lines, varying topography—are important considerations. The element of traffic-generation is present in all these relationships, and will become more apparent as the discussion continues.

Before beginning the discussion of the exclusion of uses from the various use districts, the basic reasons underlying the classification of the use of land and buildings should be mentioned. First, similar uses are naturally grouped together. Included in this grouping are those uses that require similar conditions. For example, places for the care of the sick are permitted with low-bulk, low-density dwellings; factories and distributing establishments are permitted with warehouses. Second, each use district is designed for a basic type of land use—residences in residence districts, business in retail districts, etc. However, certain additional facilities and services are needed to complete the picture. Thus fire and police stations and other community facilities are permitted to locate near residences. Third, the remaining basic factor involving use classifications is the separation and segregation of incompatible uses. One of the most important factors of incompatibility is traffic generation.

2. *Uses Excluded from Residence Districts.* The inclusion or exclusion of certain uses from any district is based upon more than one standard or principle. How-

ever, one of the basic principles is the traffic-generating capacity of the various uses of the land and buildings.

As for residence districts, the most common situation is the exclusion of apartment buildings from single and two-family use districts. Among the reasons for this attempt at exclusiveness is the protection of property values. This vague phrase has been repeated hundreds of times in justification of the establishment of single-family districts. Realistically, one of the basic considerations for this exclusion is to limit the traffic—pedestrian and vehicular—that would be brought into the district by apartment buildings.

The same basic reasoning is involved in the exclusion of business enterprises from residence districts. The argument most usually advanced to keep hospitals, schools, and other community facilities out of residence districts is the traffic-generating capacity of these uses. Because there are more compelling reasons from a planning and social point of view for the inclusion of such uses within residence districts, provisions are included in zoning regulations to minimize the bad effects of additional traffic by requiring off-street parking and loading.

Furthermore, residence districts should be so zoned and designed, wherever possible, as to eliminate the necessity of crossing major heavy traffic streets to reach any community facility, thus increasing the safety of the community.

3. *Uses Permitted in Residence-Industry Districts.* A residence-industry district is mapped in certain areas of a community adjoining low-density residence districts. This type of use district is designed for those industrial or manufacturing uses that are free of nuisances and will harmonize with the adjoining residence district. It is therefore essential that the uses permitted to operate within this district will not, among other things, generate such traffic as will destroy the neighboring residential amenities and the usefulness of the residence-industry district itself. Examples of such uses are laboratories, such as the Johnson and Johnson laboratory in New Jersey and the B. F. Goodrich laboratory in Ohio, and the manufacture of watches and optical and medical goods. Additional protection is achieved through requirements for off-street parking and loading, a limitation upon the hours that trucking may be used, requirements for landscaping, and the like.

4. *Uses Excluded from Other Districts.* The techniques of zoning retail or commercial districts have changed considerably since 1916.[7] First, the ribbon development of business uses along major thoroughfares has been replaced by the cluster development of business uses into new districts designed to meet the needs of the community. Underlying these new developments and the selection of uses permitted within the districts has been the element of traffic-generation.

Local retail districts are mapped in such locations that will efficiently serve the adjoining residence districts and minimize the possibilities of traffic congestion. The permitted uses include those which are needed to serve the everyday needs of

[7] Pollard, *Outline of the Law of Zoning in the United States*, 155 THE ANNALS 15, Pt. 2 (May, 1931).

the neighborhood and thus encourage pedestrian rather than vehicular traffic. Thus traffic-generation is kept at a minimum by controlling the density and type of use.

In the great majority of our cities a greater amount of land than is needed is zoned for retail or commercial business. Economic waste has resulted because of spotty, unplanned development. This in turn has retarded the development of other land uses in the areas so erroneously set aside for retail business. The scattered businesses have attracted traffic into areas which in most cases cannot cope with it. And again it is the unwanted and unnecessary traffic-generator that adds to the possible deterioration of part of a community.

On the other hand, well-planned, well-zoned retail districts are designed to function and are located in such a way as to do the least damage to the surrounding neighborhood and its streets. The permitted uses are carefully selected to exclude enterprises that have no relation to retail business but would merely add turmoil to the streets. Warehousing, trucking terminals, and other non-retail traffic-generators should be excluded. This, incidentally, is not the case in New York City; warehousing and wholesaling are permitted in retail districts.

The element of traffic-generation could not be more obvious than it is in the downtown or central business districts of our large cities. The tremendous bulk and density of use have caused great hardships on the merchants and the municipal authorities. Planning and zoning came too late! Today, wherever the opportunity is present, the effects of traffic-generation are the dominant consideration in the planning and zoning of central business districts. Under a carefully drawn plan building height and bulk would be limited.

Thus it is apparent that the element of traffic is of primary importance in the planning and zoning of every variety of retail or commercial use district. The proper location of a commercial establishment, be it the corner drugstore or the repair garage, is influenced by its traffic-generating capacity.

Before leaving the discussion of retail and commercial districts, one more example is worth mentioning. The consultants who prepared "The Plan For Rezoning the City of New York" created a restricted commercial-residence district. This district was designed to serve a particular portion of Madison Avenue. The commercial uses are restricted to a floor area ratio of 3.5 while the residential uses may have a floor area ratio of 10.0. Uses such as banks, art galleries, and small office buildings are permitted. Such a proposal for streets like Madison Avenue would do much to reduce the density and bulk along the Avenue and also reduce pedestrian and vehicular activity.

The field of industrial zoning is beginning to undergo a tremendous change. The conventional list of permitted or prohibited uses is recognized today as unscientific and rather arbitrary. Some cities, notably Chicago, have undertaken the development of a system of performance standards based upon the actual measurement of the nuisances produced. An integral part of such a system is adequate relief from the nuisances caused by traffic.

Under the traditional method of industrial zoning, industries are segregated according to their potential undefined nuisance capacity. Light industrial districts exclude the heavy trucking of heavy industry. Some of the newer zoning regulations also include requirements for off-street parking and loading as another step in alleviating traffic congestion.

5. *Separation of Incompatible Land Uses.* The last situation to be discussed is the segregation of incompatible land uses. One reason for such segregation is to remove those uses which cannot be "good neighbors" to the other land uses in the neighborhood. The problems of non-conforming uses and methods for their elimination are the subject of another article. It is enough for the purposes of this article to note again that one of the primary reasons and justifications for the elimination of non-conforming uses found in residence districts is the traffic generated by them. The elimination of these uses will also eliminate a hazard to the people of the community.

An attempt has been made here to point up the importance of the relationship between zoning and traffic-generation and to show how the elements of traffic fit into the planning and zoning of a community.

JUDICIAL DECISIONS

Almost from the day the police power was first used to zone a community, the courts have had to decide upon the validity of zoning. Since the traffic-generating capacity of the use of land and buildings is such an important consideration, it would not be unreasonable to expect to find this important element reflected in judicial opinions. But that has not been the case! Except in the most obvious situations, as will be shown, the courts have either been unaware of this important element of land use regulation, or have taken it so for granted that it has been ignored in the decisions. The paragraphs that follow contain cases in which the elements of traffic are recognized and used as the basis for judicial opinions.

1. *Gasoline Filling Stations.* There has been a great deal of case law with respect to the regulation of gasoline filling stations. Most of these cases find their way to the courts via a zoning board of appeals decision denying an applicant permission to erect such a use. Yet out of all the case law very few decisions consider the traffic-generating capacity of filling stations. Two cases that did consider this element were found in New Jersey and Connecticut.

In the New Jersey case,[8] the City of Englewood refused to grant a permit for the erection of a filling station on Engle Street, and the Board of Adjustment refused to recommend to the governing body of the city a variance from the provisions of the zoning ordinance. The case came before the New Jersey Supreme Court on a writ of certiorari.

The land was located in a "Restricted Business Area" in which gasoline service stations were prohibited. The plaintiff claimed that the ordinance was unreasonable and unconstitutional in so limiting the use of its premises.

[8] Citizens National Bank of Englewood v. City of Englewood, 128 N.J.L. 147, 24 A.2d 819 (1942).

In dismissing the writ, the court pointed out that the New Jersey statutes[9] provided that zoning regulations permitted by the constitution "shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: To lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population."

The court found that Engle Street was one of the major thoroughfares of the city; that in the vicinity of the premises in question the land use was partly residential and partly business and civic in character; that the street was heavily traveled; that drivers entering and leaving driveways had difficulty joining the traffic on the street; and that within the immediate area there was located a post office, a church, and two large schools.

The court said that the buildings in the immediate vicinity attracted large numbers of pedestrians and that the erection of a filling station would create a danger to these pedestrians. Considering the nature of the buildings in the area and the danger to the pedestrian traffic attracted to the area, the provision of the zoning ordinance was held to be reasonable.

The Connecticut case[10] involved an appeal from the judgment of the Court of Common Pleas, Hartford County, reversing the judgment of the board of zoning appeals in refusing to grant a certificate of approval for the location of a gasoline filling station. The Board was appealing the action of the lower court.

The evidence showed that the premises in question were located at the intersection of Woodford Avenue, a main thoroughfare, and Woodland Street. Woodford Avenue narrowed about 250 feet east of the property and formed a traffic bottleneck. South and east of the premises there were residential areas including a housing project. Woodford Avenue was used extensively by the residents in this area. The court found that school children customarily passed the location in question on foot, on bicycles, or in buses; that on the north side of the avenue, opposite the land in question, was a parking lot used by a nearby industrial business accommodating several hundred vehicles; that the avenue was lined with parked cars; and that the traffic was heavy and created substantial congestion, especially during rush hours.

The street intersecting withWoodford Avenue, Woodland Street, was in a Residence "B" Zone which adjoined the premises. The lot itself was in an industrial zone in which gasoline filling stations were permitted. However, the Connecticut law required a certificate of approval for the location of such uses.

The lower court decided that the zoning board was wrong in refusing to grant a certificate of approval. The Connecticut Supreme Court of Errors reversed the

[9] N.J. STAT. ANN. §40:55-1 (1953).

[10] Mrowka v. Board of Zoning Appeals of Town of Plainville, 134 Conn. 149, 153-154, 55 A.2d 909, 911, 912 (1947).

judgment of the lower court and remanded the case with a direction to dismiss the appeal.

After deciding that the lower court had jurisdiction in the matter, the Supreme Court went on to say that in determining the proper location for a filling station the conditions of the area existing at the time the application is made must be considered. The question to be decided, the court pointed out, was whether the proposed use would unduly "imperil the safety of the public." To answer this question, the court said consideration must be given to the other uses in the vicinity. The area, although in an industrial zone, was not built up and this fact had a bearing on the correctness of the board's finding. The court said that the fact "that a use for a gasoline station would not create a greater traffic hazard than use for other permissible purposes in such a zone is hardly a matter of which a court can take judicial notice; indeed, by requiring a certificate of approval for the location of a gasoline station and not for the other uses enumerated, the legislature has in effect established the contrary of the basis on which the court proceeded."

The court held that the findings showing the number of vehicles and pedestrians, especially children, passing the location in question, the traffic congestion, and the use of the neighboring properties made it clear that the zoning board could reasonably deny the application for a certificate of approval.

2. *Other Cases.* A recent case in Wisconsin upheld the exclusion of a private school from a residence district. In *State* ex rel. *Wisconsin Lutheran High School Conference v. Sinar,*[10a] the zoning ordinance of Wauwatosa permitted in a Residence A District public schools and private elementary schools. A Lutheran church was not permitted to erect a high school in this district. The court found the classification valid and non-discriminatory. In its decision the court cited the arguments against permitting such a use in a Residence District:

> Appellants have made it abundantly clear that respondent's projected school has many features which seriously impair the social and economic benefits to the entire community which the zoning law is designed to preserve and promote. It will add to the congestion of the surrounding streets.

The cases that follow involve a change in zoning from residential to industrial, a junk yard, an asphalt mixing plant, a trucking terminal, a warehouse, a business use in a residence zone, and a garage.

In *Parson v. Town of Wethersfield,*[11] the zoning ordinance of the town was amended so that property belonging to one Griswold was rezoned from a residence district to a light industrial district. Plaintiff sought a declaratory judgment determining the validity of the zoning change. The lower court held for the town, and plaintiff appealed.

Among the grounds for the appeal was that there was no substantial change in the neighborhood since the adoption of the zoning regulations.

[10a] 267 Wis. 91, ——, 65 N.W.2d 43, 46 (1954).
[11] 135 Conn. 24, 31, 60 A.2d 771, 774 (1948).

In upholding the decision of the lower court and the action of the town zoning commission, the Supreme Court of Errors held that the construction and opening of a major highway was an important factor to be considered in reclassifying the area from residence to industry. A master plan had been worked out by an expert planner recommending the particular change. The zoning commission said, "This change of zoning is made to provide for the most appropriate use of this land in view of its location between the Silas Deane Highway and the New Haven Railroad, and to encourage the development of desirable types of light industry within the Town of Wethersfield." The court said that the evidence fully justified a finding that the land was suitable for industrial use because of its location, its physical surroundings, and its relationship to the rest of the town.

In *Miller v. Zoning Board of Appeals of City of Hartford*,[12] plaintiff was the owner of a parcel of property 509 feet by 765 feet. A portion of the front was zoned for business. The rear of the property was in an industrial zone. Plaintiff applied for a certificate of approval to use the property as a motor vehicles sales lot and a motor vehicle junk yard. The zoning board of appeals denied the permit and was reversed by the lower court.

The general statutes of Connecticut[13] required, as a prerequisite to the issuance by the commissioner of motor vehicles of a license to operate a motor vehicle junk yard, a certificate of approval of the location from certain local officials. The statute provided that the designated authority in considering an application for a certificate should "take into account the nature and development of the surrounding property; the proximity of churches, schools, hospitals, public buildings, or other places of public gathering; the sufficiency in number of other such yards or businesses in the vicinity; the health, safety and general welfare of the public; and the suitability of the applicant to establish, maintain or operate such yard or business and to receive a license therefore. . . ."

The evidence showed that Waterfield Avenue, on which the property abuts, was one of the main arteries of the city; that the neighborhood was largely residential; that several apartment buildings housed a large number of families, including many children; and that there were two schools in the vicinity.

The Supreme Court held that the mere fact that the property in question was in an industrial zone did not entitle the plaintiff to a certificate of approval. To locate a junk yard in close proximity to property used for residential purposes might reasonably be considered something approaching a public nuisance.

Although the court did not specify what it meant by a public nuisance, it is clear from its language that the dangers of the traffic that would be created by this use were paramount in the court's decision.

In *Mitchell Land Co. v. Planning and Zoning Board of Appeals of Township of Greenwich and Bell v. Planning and Zoning Board of Appeals of Township of*

[12] 138 Conn. 610, 87 A.2d 808 (1952).
[13] CONN. GEN. STAT. §§4655-4656 (Supp. 1953).

Greenwich,[14] the land company owned land in a general business zone and proposed to construct and operate an asphalt mixing plant. The premises were serviced by barges and by trucks using the surrounding streets.

Most of the neighboring lands were devoted to industrial uses except the land on South Water Street (across from the company's property) which was improved with single and double homes.

In March, 1952, the company applied for a special exception to construct and operate the plant, and after public hearing it was denied because a large number of trucks would service the property each day and create hazardous traffic conditions on South Water Street. Also the unloading of sand and gravel would create dirt and dust in the neighborhood. An appeal was taken by the Company and in July, 1952, while the appeal was pending, the Company filed an application for rehearing. After the rehearing the Board granted an exception. From that action, the residential property owners filed an appeal. The lower court heard both appeals and dismissed each of them. From these judgments both parties appealed.

The Supreme Court of Errors of Connecticut first held that the rehearing by the Board was proper and legal because (1) a change of conditions had occurred since the prior decisions; and (2) other considerations materially affecting the subject matter had intervened and no vested rights had arisen.

The plans for the asphalt plant had been changed to meet the objections raised at the first hearing. The entrance and exit for trucks had been relocated to reduce the danger of traffic. A large portion of the property was earmarked for truck off-street parking and steps were to be taken to reduce and eliminate dirt and dust. Thus circumstances existed which justified a rehearing by the Board. The exception was granted with the following conditions:

> On rehearing it appeared that a large industrial use has been permitted on adjoining property since our decision in this case; that Water Street is 50 feet in width; and that the plan has been redesigned to provide entrance and exit ways for trucks and for on-the-lot parking while waiting for loads. . . . These new facts and safeguards . . . have persuaded us to grant the appeal, and in doing so we impose the following conditions and safeguards:
>
> 1. Materials shall be wetted down from time to time to prevent dust.
> 2. The ground surface of the entire lot shall be covered with oil or asphalt.
> 3. The plant shall not be operated on a night shift.
> 4. All trucks employed in the business shall park on the premises.
> 5. Sand and gravel shall be stored in bins.
> 6. The plant shall at no time be operated unless its dust and smoke elimination devices are functioning.
> 7. That there shall be evergreen planting to screen the plant from South Water Street.
> 8. That the plant be relocated on the lot so that the entrance shall be where the exit is shown on the plot plan which will eliminate crossing the flow of traffic by trucks proceeding south on Water Street.
> 9. The parking shall be located in the northeast section of the lot.

[14] 140 Conn. 527, ——, 102 A.2d 316, 318 n. 1 (1953).

The granting of the exception was upheld by the Court on the grounds cited by the Board.

The case involving a trucking terminal is *Borough of West Caldwell v. Zell*.[15] Defendant was convicted in the municipal court for a violation of the zoning ordinance—conducting a truck terminal in a business district. He was loading and unloading truck cargoes with the use of large tractors and trailers. This was defined as an industrial use by the zoning ordinance. Defendant contended that this was a permitted use in the business district because the ordinance did permit a public gararge for purposes of auto repair and it also allowed certain types of storage and warehousing. It was contended that an amendment to the Borough ordinance permitted operation of a bus garage for interstate buses in the business district. It was the operation of a truck terminal and transfer depot that was brought in question in this case.

In upholding the judgment of the lower court, the Superior Court held,

> This ordinance seeks to prevent the operation of a truck terminal and transfer point along the main business thoroughfare. Such an ordinance is a manifestation of the underlying goal of reducing heavy traffic and is well within the police power of the municipality. The ordinance is not arbitrary but is based on a reasonable classification which permits in a business district local trucking and storage incidental to local business but does not permit the operation of a truck terminal and transfer depot incidental to interstate movements.

Another New Jersey case is *Saraydar v. Board of Comm'rs of City of Newark*.[16] This involved a certiorari proceeding by plaintiff to review a resolution of the Board denying his application for a permit to use his premises in a residence district for a warehouse. Warehouses were not permitted in residence districts.

The court upheld the decision of the Board of Commissioners as legal and reasonable since such a use would employ fifteen trucks in its operation.

An interesting case in point is *Kent v. Zoning Board of Review of Town of Barrington*.[17] This case came to the Supreme Court of Rhode Island on a petition for certiorari. The plaintiff owned twenty acres of farm land with 800 feet of frontage in a Residence "B" district. No businesses were permitted by the town zoning ordinance in such a district, except that products grown on the premises might be sold on the premises. Plaintiff applied for a variance in order to sell ice cream, dairy products, and produce, but intended to import the milk, cream, and other ingredients from another source. The planning commission opposed the variance on grounds of health and traffic congestion, and on the basis of the potential residential character of the area. The Board denied the petition for a variance for the following reasons:

1. Plaintiff intended to conduct a business on a large scale involving quantity

[15] 22 N.J.Super. 188, 191-192, 91 A.2d 763, 765 (Essex County Ct., 1952).
[16] 131 N.J.L. 290, 36 A.2d 289 (1944).
[17] 63 A.2d 736 (R.I. 1949).

production. Such an operation to be successful would attract large numbers of highway travelers which would increase the hazards of traffic.

2. The area, although not completely developed, was suitable for development of attractive residential buildings free of business influence.
3. The proposed business would injure the neighboring property and cause a depreciation of values in the general area.

The court found that there was no abuse of discretion on this question on the part of the Board. The denial of the variance was reasonable and plaintiff's rights were not infringed.

In *Fortuna v. Zoning Board of Adjustment of City of Manchester,*[18] a bill in equity was brought to review the decision of the zoning board granting to the Manchester Buick Company a building permit to erect an addition to an existing legal non-conforming garage. The court held, among other things, that the proposed addition would be beneficial to the public interest and that the existing traffic congestion on the two streets on which the Buick Company was located would be reduced with the proposed addition.

3. *Off-Street Parking.* Although over two-hundred communities have enacted some type of off-street parking regulations, the courts have not been given much opportunity to pass upon such legislation. An excellent case recognizing the necessity of providing space for parking is *Town of Islip v. Summers Coal and Lumber Co.,*[19] this case involved a requirement for a front yard in a business district. The court quoted from the monograph, "Buildings: Their Uses and Spaces About Them," Volume VI, page 136, of the *Regional Survey of New York and Its Environs:*

> When we come to consider the need of adequate space about stores for purposes of access and parking of vehicles we will find that what are wanted are wider streets and deeper lots rather than increased frontage. But the really important questions are the distribution of the store frontage throughout the community and the preservation of adequate open space about the business buildings. . . . In many suburban store districts there is ample space in the aggregate, but . . . not properly distributed so as to give satisfactory means of access, space for loading and unloading, room for parking without interference of through traffic, and sufficient light and ventilation. . . .

The court went on to say:

> A wise public policy may require the owners of new buildings in business districts under proper conditions to set their buildings back from the street in order to enable their business to function without congesting the streets.

In *Ronda Realty Corp. v. Lawton,*[20] the realty corporation applied to Chicago's Building Commissioner for a permit to remodel an apartment building which would increase the capacity from twenty-one to fifty-three apartments. Space for 18 cars was

[18] 60 A.2d 133 (N.H. 1948).
[19] 257 N.Y. 167, 177 N.E. 409, 410 (1931).
[20] 414 Ill. 313, 317-318, 111 N.E.2d 310, 313 (1953).

said to be available. A permit was issued and several tenants appealed to the zoning board. The question before the zoning board and before the court was a section of the Chicago zoning ordinance which required one off-street parking space for every three dwelling units in an apartment house. Since eighteen parking spaces would be required, the board revoked the permit because that number of parking spaces could not possibly be provided on the premises. The lower court found the ordinance discriminatory, depriving the corporation of equal protection. On appeal, the Illinois Supreme Court upheld the lower court's decision that that section of the zoning ordinance was an unlawful classification:

> The evils to be remedied on crowded city streets are well known, but we do not see that the singling out of apartment buildings from the other types of buildings embraced by the ordinance is reasonably related to the elimination of those evils. Appellants urge that the classification is not discriminatory because it applies to all apartment buildings equally and because it is apartment buildings, more than any other type structure permitted, which contribute the most to street congestion caused by parked automobiles. We see neither a fair nor reasonable basis for such a classification nor its reasonable relation to the object and purpose of the ordinance. The street congestion problems created by boarding or rooming houses, hotels, and the like, are not essentially different from those caused by apartment buildings. All are similarly situated in their relation to the problems of congestion that are caused by parking cars in the street, and all contribute proportionately to the evil sought to be remedied. Indeed, we think it not unreasonable to say that the scope and nature of the congestion may be greater in the case of large rooming houses and hotels than in the case of apartment houses.

Although there has been a paucity of judicial language and consideration of the importance of the traffic-generating capacity of the uses of land and buildings, those courts that have spoken show a real respect for the subject and the problems created. It would be difficult to attempt to give any one reason for the lack of judicial opinion here. Corporation counsels, city attorneys, solicitors, and private practitioners would do well to consult the planner in the preparation of a brief involving planning and zoning. Only such cooperation will put before the courts all the reasons and thinking that go into planning and zoning a community, and this would in turn be reflected in the opinions.

LARGE SCALE DEVELOPMENTS AND ONE HOUSE ZONING CONTROLS

WILLIAM CHARNEY VLADECK*

All the literature concerning the development of the initial zoning ordinances and most of the literature in the two decades after the adoption of the first large scale zoning resolution in New York City[1] in 1916 is permeated with the concept of basic construction on a relatively small lot.

There is no reference to blocks, super-blocks or other nomenclature designating larger areas in any of the legislation or reports until quite recently. Even as of this date, the New York City Zoning Resolution defines a "lot," the "depth of a lot," and the "rear of a lot." The definition given to a lot is "a parcel or plot of ground which is or may be occupied by a building and accessory buildings including the open spaces required by this resolution."

By its own definition the resolution, by limiting the area of a lot to that occupied by a building, eliminates from most of the resolution any areas or parcels of land which contain more than one building and its accessory structures.

In actuality, this had been no great hardship. The general practice of construction was, until the middle Nineteen Thirties, almost entirely in the hands of private developers. Without the power of eminent domain, the acquisition of large areas was limited generally to outlying areas of communities where restrictions, if any, were of a minimal sort. Subdivision of the larger areas into small individual lots was the rule. The end result was that construction and development while done on a large scale and over large areas were, in so far as law was concerned, individual development of individual lots.

Traces of such subdivision, much of it premature, can still be found in such areas of urban centers which were not engulfed in the post-war building boom. The exceptions to this practice of subdividing into individual lots were almost exclusively devoted to large industrial developments which almost invariably were constructed in the more outlying areas.

Similarly, the few large residential developments which were planned as a unit also were out of the urban core so that they had the same latitude in so far as zoning restrictions were concerned as the non-residential uses.

The concepts of large scale developments, except as noted later, did not reach a point of general acceptance until the past two decades. The reasons are many

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[1] The major portion of the following discussion is centered around practices and experiences in New York City. The rationale is, of course, the fact that the first zoning resolution was adopted in New York City and more large scale residential developments have been built there than in any other large urban center.

and stem historically from building and financing techniques which had perhaps lived too long with the lot concept of planning and construction. The forerunners of large scale dwelling developments can be easily enumerated in the New York area and were mainly those where insurance companies or larger private building agencies began to conceive of erecting neighborhood developments as entities with homogeneous housing types and with direct relationship to community facilities. Excellent prototypes can be found in Sunnyside Gardens built in the late Nineteen Twenties by the City Housing Corporation in the Borough of Queens, New York; Radburn in New Jersey; and the Woodside apartment project in Queens, New York. Non-residential construction has fewer such examples in the urban center. The most outstanding was the development of Radio City as a commercial and amusement center.

Consciousness of the difficulties of applying zoning ordinances based upon the individual lot concept to large scale developments of full blocks or superblocks, surrounded on all sides by public streets and with no actual side or rear property lines, actually took some time to develop. It was only after the beginnings of a national housing program had passed from the stage of direct federal ownership[2] where no building or zoning laws were applicable, to the region of local ownership, where compliance with local regulations was mandatory, that the difficulties began to be actively recognized.

In point of time this occurred only in the years immediately preceding World War II and the attempts to catch up have not been successful.

The difficulties that were encountered by the designers of the initial and of even present day large scale developments can readily be understood. Almost inevitably the planners had been well indoctrinated in the technicalities of the zoning ordinance and while they instinctively planned to achieved conformity, anomalies between the basic concepts of zoning as a device to create proper environments in so far as light, air, and building bulk are concerned, and the narrow interpretations which develop with any form of restrictive legislation are quick to arise.

The majority of the problems arose where reconstruction or redevelopment of an inlying area, with its more restrictive zoning requirements, was predominantly residential. There has been relatively little difficulty with non-residential large scale development as yet.

The recognition of this conflict has grown slowly and, even today, full cognizance is still limited to the architects who have designed such developments on the one hand, and the administrative officials delegated to enforce zoning ordinances on the other.

It may be well to review some examples of such conflict and to point out the difficulties of zoning resolution revision.

[2] Under the PWA housing program of the mid-Thirties.

II

Perhaps the major obstacles to such revisions of the zoning ordinance (other than the normal difficulties of amending technical laws) have been (1) the general acceptance of the idea that most large scale developments have much higher standards of open space and consequently do not fill the permissible zoning envelopes; (2) the strong feeling on the part of many (particularly those engaged in the enforcement of the laws) that sooner or later the large developments will be broken down into individual lots; (3) the probability that with rare exception such problems will be encountered solely by public or quasi-public agencies; (4) the failure to realize that zoning is a tool that can be properly used only when there is understanding of the end to be achieved; and (5) the necessity of coordinating zoning resolution changes with other laws which also set bulk limits.

A.

The recognition of the higher standards of large scale developments can be found even in official documents, although there is the normal tendency to confuse "large scale" with "public." The history of most large scale developments to date has been almost entirely public or quasi-public for reasons which have been basically economic and which need not be developed further here. For example, the New York City Planning Commission in a report in 1944 stated:

> It is a curious fact that the standards for public and semi-public housing are many times higher than those of private developments. The accompanying photographs show the striking differences in provisions for open space, light, air and recreation in such projects as compared to private ones.

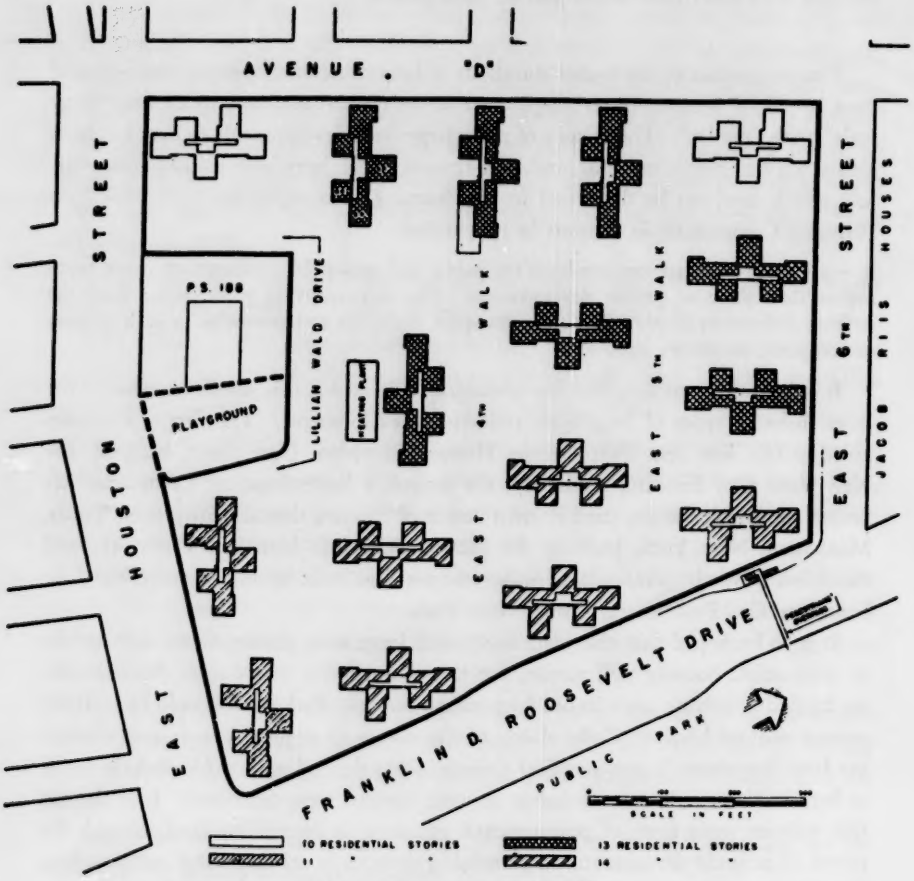
It is interesting to note that the photographs to which this statement refers show three different types of large scale residential developments. The first is the state-aided public low rent Fort Greene Houses, Brooklyn, New York, built by the New York City Housing Authority; the second, a Redevelopment Companies Act project for which the city used its own power of eminent domain, Stuyvesant Town, Manhattan, New York, built by the Metropolitan Life Insurance Company; and the third, a purely private large scale venture, also built by the Metropolitan Life Insurance Co., Parkchester, Bronx, New York.

It is to be hoped that this identification of large scale developments with public or semi-public housing will vanish, but this is not likely where such developments are located in inlying areas in our large urban centers. Parkchester could be a purely private venture because of the ability of the owner to acquire a large vacant tract, but both Stuyvesant Town and Fort Greene had to depend upon public help in so far as both land acquisition and change in street pattern were concerned. It is obvious that without some form of governmental assistance in assembling land through the power of eminent domain, and in permitting changes in existing street patterns, few, if any, private developers can get title, or use sizable inlying areas which are now vested in a multiplicity of owners.

Despite the fact that developments of this sort, both private and public, generally do not approach the maximum permitted land coverages and heights, difficulties are encountered in the execution of the projects. A case in point can well be the experience of planning Lillian Wald Houses, a state-aided, low rent public housing project built by the New York City Housing Authority in the lower east side of Manhattan, the historic slum area of New York.

In 1945, the architects, who were retained by the New York City Housing Authority for the design of the development, filed plans with the Department of Housing and Buildings.[8]

[8] The municipal agency designated by the city charter to supervise and enforce the Administrative (Building) Code, the Multiple Dwelling Law (a state law applicable then only to New York City, now also applicable to the City of Buffalo), and the Zoning Resolution.



"SITE PLAN"
LILLIAN WALD HOUSES

Included among the plans filed was a site plan which showed, among other things, the locations of the buildings, their distances from the building (property) lines and from each other, the heights of the structures, etc. The diagrammatic plan reproduced herein represents a building bulk appreciably below the normal standards of buildings which have been and still are being erected in New York City.

Despite the relative openness of the plan, however, and the fact that the total areas of all floors of all buildings were less than twice the site area, the first objection by the Department of Housing and Buildings reads as follows:

A-1 Indicate on "site plan" compliance with the provisions of Sections 8 and 9 of Article III of the Zoning Resolution as amended on December 1944.

The proposed method of computing "dormers" above the required setback is not acceptable and is not in conformity with the provisions of Subdivision (c) of Section 9 of Article III of the Zoning Resolution which is interpreted by the Department of Housing and Buildings, under G.O. 71 of 1945, as follows:

"The references to '60 percent of the length of such frontage of such part of the buildings' and 'such frontage length of such structure *at any given level*' refer to lengths of the building proper at various levels and NOT TO THE FRONTAGE LENGTH OF THE LOT OR PLOT. 'DORMER AND BULKHEAD PRIVILEGES SHALL BE BASED SOLELY AND ONLY AS TO LENGTH ON THE BASIS OF THE FRONTAGE LENGTH OF THE STRUCTURE AT THE LEVEL INVOLVED' ".

During a number of discussions with the examiners of the Department of Housing and Buildings where the architects vainly attempted to show that the proposed plan was in full accord with the spirit of the premise upon which the zoning resolution was created, it was brought out that if all the building wings were connected by structures as shown herein,[4] there would be full compliance with the letter of the resolution.

This indicates how the *increase* of bulk and consequently of population density by the increase in size or number of buildings could have put the development in compliance with the zoning resolution.

Obviously the zoning resolution techniques had become technical formulae rather than an attempt to interpret the resolution in order to comply with its original purpose and spirit.

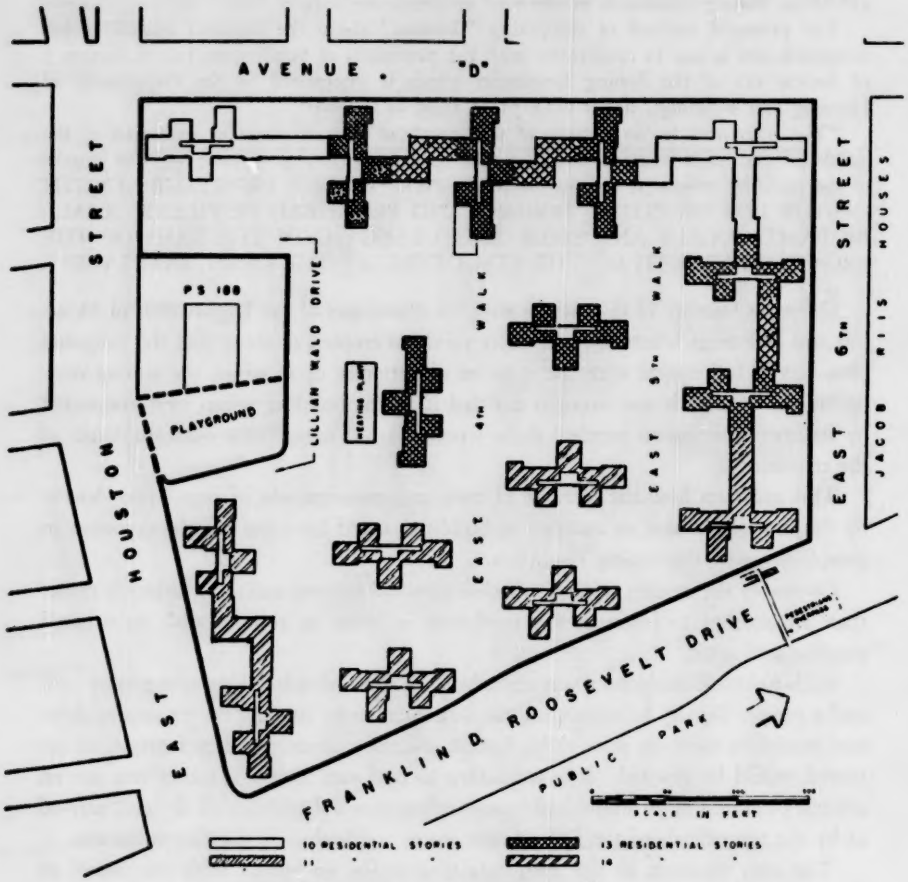
Such technical conformity was agreed to, but short of redesigning to a greater bulk and a greater density by connecting the structures or by moving the structures about and creating a new site plan, or by further widening already widened streets, no approval would be granted. It is important to be aware that this action was not an arbitrary opinion of an individual examiner but was a departmental decision arrived at by the top officials of the Department up to and including the Commissioner.

The only recourse of the architects was to file an appeal with the Board of Standards and Appeals. Such appeal was filed and, after hearing and deliberation, the following decision was announced.

[4] This plan was never actually submtted to the Department of Housing and Buildings but is included as an example of how technical conformity could create less desirable results.

WHEREAS the applicant states that the premises consist of a plot of 961' and 613' front by 937' and 865' in depth on which it is proposed to erect 13 buildings, 14 stories in height, and 3 buildings, 10 stories in height, of Class 1 construction; that it is proposed to demolish existing building and erect Class A multiple dwellings and

WHEREAS the applicant contends that the proposed project will consist of four 11 story and twelve 14 story buildings on a net area of 701,768 sq. ft.; that the land area to be covered by all the buildings will be 125,869 sq. ft. or approximately 18% of the entire net area of the project; that it is apparent, therefore, that the ratio of the area of the buildings to the area of the site is considerably less than the maximum of 25% set forth in the zoning resolution; that the plan as presented provides adequate light and air in all respects as evidenced by the minimum distance between any two buildings.



"SITE PLAN"
LILLIAN WALD HOUSES

RESOLVED that the Board of Standards and Appeals does hereby make a variation in the application of the area district requirements of the zoning resolution and that the application be and it hereby is granted under Section 21 thereof, as to N.B. application 56, 57, 58, 64 of 1945 on condition that in all other respects the height requirements of the zoning resolution shall be complied with; that all permits shall be obtained and all work completed within one year from date of this resolution.

B.

The anticipation of eventual sale and split up into individual ownerships of large scale developments is not uncommon, and even at this rather early stage in the history of such developments there are a few examples of reversion to the lot base which justify this attitude. In addition to this type of change, there are also cases of sales of property erected by the Federal Government without direct adherence to local zoning ordinances to local agencies or individuals, who then face the difficult problem of demonstrating compliance in order to get certificates of occupancy.

A good example of this breakdown can be found in the recent history of Sunnyside Gardens. In the original development built in the late Twenties, there were three central garage compounds providing service to the adjacent owners. The original building company and its successors held title to the garages despite the fact that the houses (two story row houses) were sold on an individual basis. When the company owning one of the garage compounds finally sold it to a corporation formed by 26 owners of houses and that corporation in turn deeded the garages separately to 26 individual owners, problems immediately arose. As a compound they had been recognized as an accessory to a residential use, but now the area is zoned residential and a garage covering the entire area of a lot less than 10 by 20 feet is not interpreted as being an accessory use, despite the fact that the use is the same, and by the same people.

It has now become necessary for the new owners, each individually, to re-file plans with and get objections from the Department of Housing and Buildings and then to throw themselves upon the mercy of the Board of Standards and Appeals in order to continue legally a use which has existed for almost three decades without change.

Certainly the basic intent of providing accessory parking use still is valid, but technically the tool of zoning now would not permit such similar use without grave difficulties. Changes in the zoning resolution to retain the intent of accessory parking within reasonable walking distance of dwellings should eliminate the requirement that such use must be on the same lot.

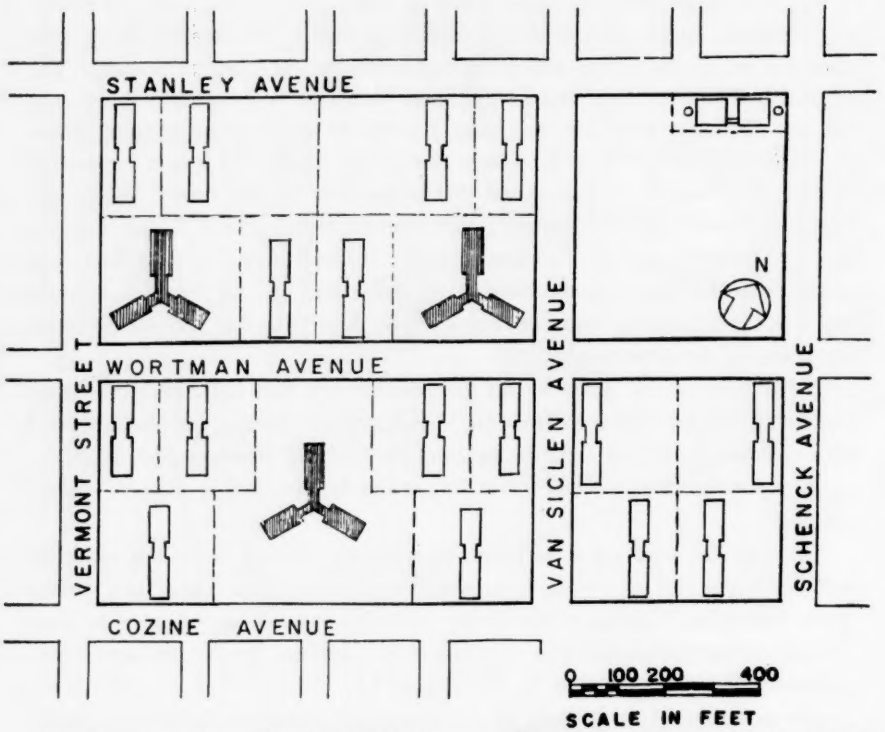
An indication of the attitude of the examining officials toward such a possible breakdown can be found in almost every large scale development which has been or is being planned in New York City. It is necessary, in filing such plans, to indicate initially the individual lot lines of each separate structure. These lines do

not exist in actuality, but are rather projections in order to permit examination of compliance on the basis of individual buildings on individual lots as shown herein.

There is no other machinery in the zoning resolution or building code, as a matter of right, which permits examination of large scale developments without the necessity of going originally to the Board of Standards and Appeals. Section 21-C of the New York City Zoning Resolution provides this method of approval, but in practice, it is much simpler to draw the lines than to have to spend the time and energy required to go to another reviewing board.

C.

The argument that such problems will be met only by public or quasi-public agencies who have the time and personnel to go all around Robin Hood's barn in order to get approval is erroneous for at least two reasons. On the one hand, it is



SITE PLAN
LINDEN HOUSES

certainly not good governmental procedure to make difficulties for anyone, be they public or private. On the other hand, the work of obtaining initial approvals falls in most part upon private architects and engineers retained by such agencies. The increasing number of large private developments brings the problem into sharper focus. The ultimate breakup of large developments can be anticipated, but it certainly could be done more simply.

The chief difficulty in obtaining amendment of the zoning resolution is, I believe, the fact that it still affects relatively few people and they are in the main technicians who are presumed to be competent to handle the extra work entailed, even though it be unnecessary. Certainly almost all large developments have been and will continue to be under the maximum bulk standards now permitted under the zoning laws. The revisions which might make approvals simpler and permit technical compliance with the spirit of the law as a matter of right need not create lower bulk or density requirements of themselves.

D.

There have been amendments to zoning and to planning regulations adopted in the past and there are many proposed, but few achieve a clear statement of intent which provides an adequate basis for direct appraisal or review.

There are three basic zoning regulations already enacted in the New York City Code: Section 3(10) applicable to non-residential uses on plots of 10 acres or more in areas zoned residential; Section 19-B (a) which permits lower initial parking spaces for public housing projects fully subsidized from federal, state or city sources; and Section 21-C mentioned previously. None of these helps much in the initial design of projects.

Zoning is, after all, a tool which a municipality or other governing agency uses to effectuate a plan. Much of the difficulty in meeting present zoning requirements stems from the basic fact that most communities have no plan advanced to such a point that it clearly guides growth or rebuilding, and have no clear concept of all the basic reasons for zoning. Moreover, there is both lack of coordination between a Master Plan (where it does exist) and the Zoning Resolution, and also the disappearance from too many minds of the basic concepts of the original zoning and its yard, setback, height, etc. requirements.

A great deal of interesting comment was engendered during and preceding hearings held on a new zoning proposal which had been prepared by a firm of consultants[5] for the New York City Planning Commission a few years ago. The general tenor of many presentations was to the effect that the proposed zoning resolution was in actuality a master plan. Nothing could have been further from the truth. The proposal was simply an attempt to provide a better tool for the effectua-

[5] PLAN FOR REZONING THE CITY OF NEW YORK, A REPORT SUBMITTED TO THE CITY PLANNING COMMISSION BY HARRISON, BALLARD, AND ALLEN (Oct. 1950).

tion of such a master plan as had been or would be adopted. The fact that the proposal is still unaccepted by the City Planning Commission or by all too many of the public stems to a great extent, I believe, from such misunderstanding.

E.

There has been a good deal of discussion about the necessity in new zoning regulations, not only for provisions for the reduction of presently permitted building bulk, but also for provisions making certain in advance that adequate spaces are set aside for community uses when large scale projects are developed.

Many smaller urban centers and semi-urban communities do have such requirements in their zoning or, more generally, in their sub-division regulations; still it may be questionable as to how far a larger city should go where undeveloped land is concerned. Where rebuilding existing areas is done on a large scale, however, the solution becomes somewhat simpler. Any large development in an urban center invariably requires the closing of city streets and it should not be considered inequitable to require the earmarking of an area, more or less equivalent, for community purposes such as street widening, parks, playgrounds, school sites, etc. In practice this has been the case to a large extent in most large scale developments, not as a matter of law, or of zoning, but as a *quid pro quo* in obtaining approvals from the regulatory agencies. With the growth of large scale developments and the hope of an ever increasing number of such developments—public, quasi-public, and private—a method of setting legal requirements for such property reservations must ultimately be adopted. There is no method of making such provision, short of the completion of a master plan for every community, which would be easily workable, except a general clause in a zoning resolution. This clause would be to the effect that the developer would be required to cede to the municipality such areas as would be required for public uses, up to the extent of the area received by the developer from the closing of streets, with additional public areas, if required, to be acquired by the municipality simultaneously at a fair price.

III

Proposed revisions of zoning resolutions, therefore, should be developed with the background reasoning that:

1. The concepts of bulk, light, and air must be re-examined in connection with large scale developments.

2. Accepted standards of large scale design are much higher, in so far as density, coverage, bulk are concerned, than lot zoning requirements.

3. There should be a provision in the zoning law that future changes of ownership would not require adherence to individual lot requirements if no substantive change in structures or uses is made.

4. There should be a mandatory requirement in the law that certain public spaces be a necessary adjunct to any large scale development.

5. Changes in zoning laws are difficult to achieve at best, and special efforts are required when the effect of changes is applicable to what is still a basically governmentally sponsored or aided operation.

6. The best results require the best tools, and present inadequacies in zoning codes do not permit easy attainment of these results.

7. Large scale developments and large scale redevelopment must be encouraged and assisted if we hope ever to rebuild our cities.

ZONING FOR AMENITIES

SEYMOUR I. TOLL*

I

Bulk zoning is an awkwardly built haycock of factual material badly entangled around the firm legal doctrine of the police power and its conjoined rule of reasonableness.[1] One who would build better must first do a lot of unsnarling.

The regulation of "size, shape and placement of buildings on the land"[2] is a considerable area of bulk zoning. To say that this presently defines "bulk zoning" is unfortunately accurate. The misfortune is that the term covers a variety of things all related to zoning, but few have much to do with bulk as that word is commonly used and probably so understood. The bulk usage might be defended on Humpty Dumpty's theory that it means what the user chooses it to mean, "neither more nor less," but like Alice all non-users are then needlessly put upon to do a lot of unlearning. Measured by Webster's standard,[3] bulk zoning is a meaner description of the object to be described than is the label "liquid" on a box containing fifths of scotch, jugs of water, and carboys of acid. Each tag is more a secret than a specification.

The term completely fails to suggest the accepted purposes of such zoning regulations—control over population density, daylight, air, and open space—nor does it hint at the kinds of techniques applied in pursuance of the goals. The other great area of zoning law has a caption which evokes considerably more immediate understanding, at least among lawyers: use zoning.

The semantic flaying is meant to stress the need for novel thinking about an important area now so misleadingly named and inadequately charted as a whole that

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[1] The doctrine and the rule are stated succinctly in the landmark zoning case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Before a zoning ordinance will be declared in derogation of U. S. CONST. AMEND. XIV, §1, its provisions must be ". . . clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." For a thorough catalogue of authorities upholding the constitutionality of zoning as a proper exercise of the police power see 8 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 18-19 n. 30 (1950).

[2] Comment, 60 YALE L. J. 506, 507 (1951). This is an excellent modern study of the problem. Among its many valuable contributions is a fine array of citations to local zoning ordinances containing many of the regulations used in the field. The quotation is in no sense meant as the object of any subsequent criticism any more than is the Comment from which it comes. It is inserted merely as a responsible point of departure beyond which I am trying to develop one of several themes for all of which I am solely accountable.

[3] These meanings are the least remote from the subject:

"bulk, *n.* . . . 1. A heap; . . . 3. Magnitude or volume; spatial dimension; esp. considerable volume; great extent; imposing dimension . . . ; 4. A mass or aggregate, esp. one of large size; . . . 6. The main mass or body; the largest or major portion. . . ." WEBSTER'S NEW INTERNATIONAL DICTIONARY 352 (2d ed. unabridged, 1950).

one may not know where he is even when he reaches its interior. This carping preface also assumes a great truth in George Orwell's thesis that imprecise language and imprecise thinking nourish each other and poison the rest of us.[4]

The term bulk zoning is unclear and should be abandoned. If a more instructive denotation exists it should be used; if necessary a synthetic term could be formulated to identify that now anonymous portion of zoning law marked off by *zoning regulations of height, shape, and placement of buildings on the land which are applied to control population density, open space, and access to daylight and air.*

But the snarl will not disappear with a renaming. The material itself causes most of the difficulty, the rest being the result of too much classification and too little imagination.

Although it is relatively easy (and certainly necessary) to verbalize the ends of these zoning controls and the particular techniques employed to gain them, in practice ends and means are largely overlapping and sometimes identical. Everything seems to be happening at once. It is. Understanding is also impeded because such yields as result from the applied techniques are more often than not by-products. Frequently one has the feeling a refinery visitor might have as he expectantly watches an apparatus for gasoline and, unless he knows where and when to look, sees only kerosene and tar oozing out.

A simple experimental model renders this graphic.

On a sunny day set up a large tray in which a few cubes of different sizes are clustered tightly. The object of the experiment is so to arrange the cubes that each receives the maximum possible daylight. The control of daylight accessibility is, of course, one of the subjects of the larger inquiry. It is apparent that the daylight any given cube receives is a function of its relationship to the other cubes in the tray. Proximity and the bulk and sun orientation of each cube are the important factors in the relationship. The smallest or shortest cube at the cluster's center will likely receive daylight only on its top. To bathe the sides as well as the top of this cube we must move those pressing in on it sufficiently to expose its sides. This will create open space around it and will also give its sides access to air flowing across the model. Daylight has now reached the smallest cube, but the placement of the cubes in the tray, the flow of air among them, and the space around them have all been altered in the process.

Assuming we have made only these simple moves, when we say that we have created or controlled accessibility to daylight have we said everything? Clearly not, because more than this happened in the tray. Perhaps it is better said that access to light has been controlled along with air accessibility and open space around the cubes. In this primer example we observe three things happening at once. Because the point of the demonstration was daylight accessibility open space and air accessibility appeared as side effects or by-products, but if we had sought open space around

[4] GEORGE ORWELL, POLITICS AND THE ENGLISH LANGUAGE, A COLLECTION OF ESSAYS 162, 163 (1954).

the little cube, the by-products would have been otherwise: increased daylight and air accessibility.

The model has to be changed a bit before it begins to buzz like reality. Instead of a few cubes in a large tray, assume many oddly shaped forms clustered in a small tray, and assume further that they represent buildings occupied by people. If we start again toward the simple goal of daylight accessibility, we can make only a limited number of moves outward toward the edges of the small tray. Once this is done, the irregular forms must be so permuted that the result is as much daylight on as many of them as possible. Note how the by-products of the experiment have multiplied. Spatial relationships have altered. There has been a rearrangement of forms. Air accessibility has probably been affected. Since these objects are imaginary occupied buildings, there may also be effects on population density because building shape may be a determinant of occupancy numbers. Finally, the visual aspect of the model has probably altered a good deal more than it did in the first example. It ends up looking very different than it did at the beginning of the experiment.[48]

If instead of seeking maximum daylight on all the objects we had tried to put as much open space as possible around them, consider how the by-products would have been changed.

On balance, then, at least three kinds of distinct yet related techniques are interplaying: controls over open space, population density, and accessibility to daylight and air. The objects of these controls are the stuff of the now nameless definition. Because of their linkages and because they function together if they function at all, it therefore seems best that they be thought of comparably. The clinching justification for dealing broadly is not yet apparent: not only do the large objectives hang together, but frequently the mechanisms by which they are sought are literally identical.

Before the details close in, the admirer of intellectual wholeness may ponder whether so closely a related set of objectives might not be reached through one detailed instrument of control. Experience, if not the experiments, quite clearly suggests that an all-purpose technique is out of the question. When it is unconsciously attempted, it does nothing well and most things poorly. In such problems there are a host of variables and although a single formulation may be possible (given the standards), it would be an administrative nightmare. In an age of punchcards and electric computers this conclusion, of course, is something less than firm. Pending automatization, the pattern will be that of few objectives and many techniques.

The nap has worn off the word ideals, but there is still much use in the concept. In truth, ideals should be the beginning and the end of urban zoning and planning yet they are starving for want of serious concern. Two questions abide here, one a

[48] It is possible that the concept of such a model will to a small but intriguing degree be reproduced in the real world. Grand Junction, Colorado, is to have a six story building which will rest on a giant pivot or turntable with clockwork in its base. This mechanism will turn the building as the sun crosses the sky, orienting its two sides of translucent brick to the winter sun and turning them away from the summer sun. N.Y. Times, Dec. 6, 1954, p. 24, col. 4.

kind of utopian query, the other scientific. Each ultimately ramifies into zoning objectives.

What kinds of cities do we want? The question, rarely answered,[5] rarely asked, haunts the inner life of the American urban planning movement and is a persuasive although infrequently advanced explanation of why this growing body of thought burns most of its energy trying to arrest and destroy urban decay rather than in creating a richly livable, fully desired urban setting. Both tasks are commendable. Both are necessary for genuine city growth, but they are as distinct as the absence of disease and a state of well-being.

Although far from won, the fight against urban decay is something most recognize and support even if there is much contention about tactics. That fight is sufficiently institutionalized to have its own battle cries such as slum and blight. Its vision of victory, which any reasonable man can grasp, is the slumless city. But beyond that few seem to go or care. Yet there lie the answers, if there are any, to the question of what kind of city and city life would offer the physical and spiritual resources necessary to build values which now sound like quaint phrases: pride and love of city from which so much of true citizenship flows.

The great impact of these zoning controls is visual. For better or worse they sculpt the face of the city with the architectural design limitations they impose on building shapes and sizes. They also govern to a sizable extent the amenities of daylight, air, and privacy, and assert limits on the distribution of urban population. These, of course, are important determinants of a city's character. Consequently, if widespread and continuous thought were applied to the long-run utopian query, it is very probable that the formulation of such zoning controls would be a much more purposeful task than it has been until now.

The second large problem is scientific. What are those standards, principally medical, which should govern accessibility to daylight and air, open space, and density levels? Although there has been relatively little canvassing of the question, the material that does exist[6] is extremely useful and suggests more about the profile of a physically healthy city than we presently know about the profile of a beloved city.

It is [illegible] much ever to expect watertight standards here. The problem is laced with such real but vague psychological elements as the states of mind formed by variations in daylight and urban crowding. Yet other facts are quite finite: the relationship between disease and lack of daylight, impact of population density on sewerage facilities, the amount and quality of open space necessary for adequate juvenile recreation—to mention but a few. In any event, the courts' search for

[5] Lewis Mumford is one of the rare probers. Over the years he has enriched both the questions and answers with unique scholarship and imagination. See, for instance, THE CULTURE OF CITIES (1938), and CITY DEVELOPMENT: STUDIES IN DISINTEGRATION AND RENEWAL (1945). See also, Riesman, *Some Observations on Community Plans and Utopia*, 57 YALE L. J. 173 (1947), and the interlocking PERCIVAL AND PAUL GOODMAN, COMMUNITAS: MEANS OF LIVELIHOOD AND WAYS OF LIFE (1947).

[6] Notably, AMERICAN PUBLIC HEALTH ASS'N, PLANNING THE NEIGHBORHOOD (1948).

reasonable relationships between zoning controls and the classic elements of the police power makes no impossible demands for meticulously precise standards.

In this setting the controls operate toward formulated goals, the courts do their testing, and the city evolves.

II

THE CONTROL OF POPULATION DENSITY

It has been held that a municipality's power to regulate density rests on a grant of such power from the state legislature.[7] Three distinct approaches have been used in exercising that power.[8] Because any reasonable density control has to be something less blunt than a turnstile technique, each is to some extent indirect. This is not necessarily a weakening feature, but if the indirection becomes excessive the tools grow so cumbersome and crude that they cannot do what is expected of them.

Density controls have been imposed on (1) the shape of buildings, (2) numbers of people rather directly, and (3) building volume or the ratio between building floor area and the underlying lot.

Each exerts important effects on the level of urban density and reveals much about the intensity of urban congestion. They are of great significance in molding the design of buildings and consequently have had much to do with the visual aspect of the city. Some of the techniques impose unnecessarily severe burdens upon experimental design in architecture. Of this, little has been written by men in the field, although the existing literature[9] does point up great gaps between traditional density controls and recent technological developments in building.

Limits on building height, the so-called set-back, and provisions for yards and courts are the methods traditionally used to order building shapes. The control of structural shape, of course, is intended to place limits on density.

Courts have widely upheld reasonable regulations over the height of buildings as a valid exercise of the police power.[10] Although such measures were used early in this century,[11] they were first welded into the machinery of zoning in the pioneer 1916

[7] Barker v. Switzer, 209 App. Div. 151, 205 N.Y. Supp. 108 (2d Dep't 1924) (the invalidated control limited number of families per acre).

[8] For descriptions of methods of calculating population trends and density standards, see Nash, *Techniques for Calculating Demographic Changes and Density Standards*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING—1950 68 (1950): HARRISON, BALLARD AND ALLEN, PLAN FOR THE REZONING OF NEW YORK CITY—FRAMEWORK FOR REZONING: POPULATION-TECHNICAL REPORT NO. 1 TO CITY PLANNING COMMISSION (1949).

[9] Agle, *A New Kind of Zoning*, Architectural Forum, July, 1951, p. 176, is a valuable example.

[10] See, for instance, Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), *aff'd*, 214 U.S. 91 (1909) (pre-zoning case validating act of Massachusetts legislature establishing two types of height districts in Boston); Brougher v. Board of Public Works of San Francisco, 205 Cal. 426, 271 Pac. 487 (1928), 107 Cal. App. 15, 290 Pac. 140 (1930) (building height regulation); Brown v. Board of Appeals of City of Springfield, 327 Ill. 644, 159 N.E. 225 (1927) (zoning ordinance); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925) (zoning ordinance). CHARLES A. RATHKOPF, THE LAW OF ZONING AND PLANNING 455-456 (2d ed. 1949) and its SUPPLEMENT AND DIGEST 208 (1951) cite a number of other authorities.

[11] For example, Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), *aff'd*, 214 U.S. 91 (1909).

New York Zoning Resolution. The initial motivation for the restrictions was primarily the daylighting of buildings rather than density control. This was particularly true for residential areas where aggravated congestion had not reached the proportions it had in commercial areas.[12] Their original justification has shifted, and they remain to operate in many cases as the sole limits on density.

Height controls are variously expressed from a simple footage statement of maximum height to ratios between street width and building height or variants thereof. The most interesting in terms of its architectural effects on the profile of the downtown metropolis is the set-back, a derivative height control which in effect terraces the upper façades of taller buildings. A regulation might, for instance, prescribe a set-back of three feet for every building story above twenty.

The stepped effect has been tartly dubbed the ziggurat after a form of Babylonian temple tower. Admirers of the clean-slab school of contemporary office design (*e.g.*, such buildings as the U.N. Secretariat) are offended by the pyramidal results imposed by the regulation. There are also those who find the ziggurat distasteful while harboring no special love for the unbroken façade.[13]

Save for one pregnant possibility,[14] the era of immense eruption seems over, at least in Manhattan. There, although tall buildings are still being erected, they are overshadowed by such collossi of the 1930's as the Empire State Building (102 stories,

[12] See N.Y. COMMISSION ON BUILDING DISTRICTS AND RESTRICTIONS, FINAL REPORT c. II (1916).

[13] See Mumford, *The Sky Line*, The New Yorker, Oct. 23, 1954, pp. 132, 134, 135. Mr. Mumford suggests that the ziggurat, although moderately successful as an insurer of light and air, actually enabled a vast increase in population density. Densities have markedly increased, but the set-back is not inherently to blame. It is rather a question of what if any density levels were assumed when that technique, among others, was applied. In reality, the limits on New York City's population are controlled by a set of regulations whose "envelope" if filled would have a resident population of about seventy million and a working population of around three hundred million. HARRISON, BALLARD AND ALLEN, PLAN FOR THE REZONING OF NEW YORK CITY, *op. cit. supra* note 8, at 4.

Mr. Mumford, out of sympathy wth the ziggurat, feels little affection for the slab form as a modern theme which, he states, is fashionable today although first conceived in Burnham & Root's Monadnock Building in Chicago (1889). He says the form is ideal for the provision of light and air "but it is as outmoded as a Roman colonnade in a day when air-conditioning and effective artificial indoor lighting are commonplaces" (at 135). He does, however, commend the form for its release of architectural and investor imagination from the ziggurat d the earlier, pseudo-cathedral tower of the Woolworth Building period" (at 136).

This article also restates a proposition which Mr. Mumford has been urging for some time: although tall buildings may return handsome profits for the builder, they may prove uneconomical for the investor.

[14] Recently there have been persistent reports that the new management of the New York Central Railroad may erect a vast skyscraper where the Grand Central Terminal Concourse now stands. At an October 21, 1954 meeting of the New York Society of Security Analysts, Robert R. Young, Central's chairman, stated: " 'The air rights above Grand Central turned out to be much more valuable than the high value I had placed on them.' It was reported Mr. Young was advised that a skyscraper development of those rights 'may possibly double the value of our six hotels and vastly enhance all the other Park Avenue property . . . so we are certainly going to mark time on selling them.' " N. Y. Times, Oct. 22, 1954, p. 37, col. 6. There are growing pleas that the Concourse be spared this fate. N. Y. Times, Nov. 18, 1954, p. 32, col. 3.

At this writing, there is an alternative plan under which the Concourse will be preserved. Two earlier plans would do away with it. In each of the plans, however, a vast office building is contemplated in the development of the area. The most striking of these plans envisages an 80 story office building with an observation tower higher than the Empire State Building. N.Y. Times, Feb. 8, 1955, p. 20, col. 3.

1472 feet, 1931); the Chrysler Building (77 stories, 1,046 feet, 1930) and Sixty Wall Tower (66 stories, 950 feet, 1932). If shrinking height portends future downtown building practice, it could mean the eventual disappearance of the set-back, for in the last analysis it was great height which inspired it.

The set-back is sometimes coupled with provisions for building tower regulations. These allow greater heights than permitted by set-back controls if the tower occupies no more than a stated portion of the building lot and stands back a certain number of feet from all lot lines.[15] It was under such provisions that many giant office buildings were erected. The combination of ziggurat topped with a tower squeezed thin by coverage restrictions has sometimes led to curious results in less than block-sized developments.[16]

Yard and court requirements are the other density techniques used to mold building shapes. They typically limit minimum sizes of courts,[17] front,[18] side,[19] and rear yards.[20] All of these measures limit building coverage of the lot and, in conjunction with height limitations, their effect is to prescribe allowable building shapes. Like height regulations, yard and court requirements were initially directed toward light and air problems, but in the development of American zoning they have also come to be used as density restrictions.

These common measures for controlling building shapes and ultimately density suffer from too much indirection and consequently have failed to get any real grip on the problem. That they were initially fashioned for other ends partially explains their inadequacy. They are one set of answers to a somewhat different set of questions. Yard requirements in low density areas are the notable example. They are sparingly used there to secure daylight and open space minima with the result that

[15] See, for example, ZONING RESOLUTION OF THE CITY OF NEW YORK §9(d) (unlimited tower height if building area above given level is less than 25 per cent of lot area and tower is at least 75 feet from the centers of all streets on which it faces); PHILADELPHIA ZONING ORDINANCE §20(e) (unlimited tower height provided tower occupies less than 25 per cent of lot area and is not within 25 feet of lot lines, and tower width is less than half the width of lot line toward which it faces).

[16] "Typical of scores of resulting bad buildings is the venture now under construction alongside Rockefeller Center, with a tower so small that it is nearly half filled with utilities and shafts, but with lower floors so big that some desks will be 80 ft. from the nearest window!" *New York Rethinks Its City Plan*, Architectural Forum, Sept. 1950, pp. 122, 124, col. 1.

[17] Bebb v. Jordan, 111 Wash. 73, 189 Pac. 553 (1920) (building regulation—light and air function).

[18] For example, Gorieb v. Fox, 274 U.S. 603 (1927); Hayes v. Hoffman, 192 Wis. 63, 211 N.W. 271 (1926); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925). Compare White's Appeal, 287 Pa. 259, 134 Atl. 409 (1926). 1 E. C. YOKLEY, ZONING LAW AND PRACTICE 407 n. 6 (2d ed. 1953) cites a number of other authorities.

Front yard regulations are sometimes incorrectly called set-back lines. The improper usage traces back to a pre-zoning era in which some states enabled municipalities, under eminent domain, to establish set-back or building lines to delineate future street widenings. The misapplication of the term to front yard regulations can lead to the contention that the front yard requirement does not truly relate to the police power. EDWARD M. BASSETT, ZONING 61-62 (1940), citing Bouchard v. Zetley, 196 Wis. 635, 220 N.W. 209 (1928).

[19] For example, Ujka v. Sturdevant, 65 N.W.2d 292 (N.D. 1954); L. & M. Inv. Co. v. Cutler, 125 Ohio St. 12, 180 N.E. 379 (1932); City of West Helena v. Bockman, 221 Ark. 677, 256 S.W.2d 40 (1953).

[20] Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925); Honigfeld v. Byrnes, 14 N.J. 600, 103 A.2d 598 (1954).

building size incurs no effective regulation. Furthermore, they are cumbersome to apply, particularly when allowable density levels have to be altered with any frequency. As elsewhere noted,[21] the city planner could calculate maximum building sizes for building lots in high density areas, then render those into cubic or square footage which in turn would yield an estimate of allowable population. But any change in a given density level would require a series of reverse calculations before new density controls could be formulated.

Since mass domestic and commercial decentralization is now well under way,[22] urban density patterns are in a new state of ferment. Changing concepts of healthy density standards can be expected as our knowledge advances. It is, therefore, likely that permissible density levels will begin to change rather often. This will throw an onerous administrative burden on those who must work with these controls.

More recent density regulations have come fairly close to direct head-counting. The usual methods turn on relationships between lot area and some other unit such as a dwelling, family, living room or bedroom.[23] In single family districts such regulations, of course, are pointless since only single family residences are permitted there. But until the minimum lot area per family is fixed density remains unchecked. Control in those situations is therefore handled directly by specifying lot minima.

The controls give the planner a virtually immediate and quite accurate idea of allowable density levels. All that he must know is readily available: lot area sizes and family sizes or average number of persons per room in question. Note, however, that the techniques are applied to residential areas and not to commercial districts.

These methods of density regulation have been criticized for the economic inequities they encourage by putting a premium on homes principally for the large or affluent family, thus allowing a zoning ordinance to exercise less than direct influence over building development.[24] At bottom is the vexed question of "snob zoning"[25] and the earlier inquiry as to what it is our communities desire as a physical

[21] Comment, 60 YALE L. J. 506, 515 (1951).

[22] For an enlightening study of the extent and social ramifications of this exodus, see Allen, *The Big Change in Suburbia,* Part I, Harper's Magazine, June, 1954, p. 21; *Crisis in the Suburbs: The Big Change in Suburbia,* Part II, Harper's Magazine, July, 1954, p. 47.

[23] See, for example, Carey v. Cassidy, 103 A.2d 793 (R.I. 1954) (Newport, Rhode Island ordinance prohibiting buildings accommodating more than two families for each 20,000 square feet of lot area barred conversion of barn into four-apartment house).

[24] Comment, 60 YALE L. J. 506, 516-517 (1951).

[25] A charged term for applying zoning regulations to create or perpetuate residential district exclusiveness. The cases harmonize in seeking to test for reasonableness of the restrictions, but more light is needed on the essential motivations behind such restrictions. See, Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942) (minimum one acre house lot in town near Boston sustained as not clearly unreasonable); Dilliard v. Village of North Hills, 276 App. Div. 969, 94 N.Y.S.2d 715 (2d Dep't 1950), *reversing* 195 Misc. 875, 91 N.Y.S.2d 542 (Sup. Ct. 1949) (ordinance requiring two-acre lot minimum in Long Island suburb upheld); Franmor Realty Corporation v. Village of Old Westbury, 280 App. Div. 945, 116 N.Y.S.2d 68 (2d Dep't 1952) (ordinance setting a two acre minimum upheld on authority of *Dilliard* case); Weissmantel v. Village of Sands Point, 129 N.Y.S.2d 640 (Sup. Ct. 1954) (invalidated amended zoning ordinance which, by adding exclusions in acreage computation, would have prohibited residence which fulfilled previous ordinance's one acre requirement; amendment

setting. Probably the most readily identified and intelligible answer today comes from the wealthier dormitory suburbs whose residents quite clearly and understandably prefer economic class homogeneity with its attendant symbols. The ample house on a spacious lot is such a mark. The proof of reasonableness sought by the courts here is a test of fact. Beyond this are challenging problems in social philosophy which cut across class lines and through many other areas of zoning controls.

The most promising density controls are designed to regulate the cubic content of a building[26] or the ratio between its floor area and lot area.[27]

Cubage techniques are formulated from one of several possible relationships, such as lot area times some number or street width multiple. Limits are stated in terms of cubic footage or cubic yardage. Floor-area ratio is expressed as a multiple by which building floor area may exceed building lot area. Thus a ratio of 10-1 would permit a building floor area ten times the area of the building lot. Limits therefore are ultimately in terms of square feet. In the absence of any other controls, a floor-area ratio of 10-1 would permit a ten story building covering its entire lot, a twenty story building covering half its lot, and so forth.

Although not so direct as those discussed earlier, these techniques may produce a degree of control roughly equivalent to even the most direct measures but without some of their disadvantages.

Each method rests on calculating the number of people using a specified amount of building volume or floor area.[28] A statement of either cubage or floor area ratio

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adopted subsequent to building application); Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952) (five acre minimum in strictly rural area not unreasonable per se); Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed for want of substantial federal question,* 344 U.S. 802 (1952) (three acre minimum in St. Louis area upheld).

Another technique which has generated conflict in this respect is the minimum size housing requirement. See, Lionshead Lake v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1953), *appeal dismissed for want of substantial federal question,* 344 U.S. 919 (1953); Williams, *Minimum Building Size,* American City, Oct. 1951, p. 130; Smith, *More on Wayne Township and Minimum-Size Zoning,* American City, Nov. 1951, p. 133; Williams, *Economic Segregation Through Minimum-Size Housing,* American City, Dec. 1952, pp. 126-127; Boldt, *Pennsylvania Court Rules on Snob Zoning,* American City, April, 1950, p. 129; PLANNING ADVISORY SERVICE, AMERICAN SOCIETY OF PLANNING OFFICIALS, MINIMUM REQUIREMENTS FOR LOT AND BUILDING SIZE, INFORMATION REPORT No. 37 (April, 1952); REGIONAL PLAN ASSOCIATION, ZONING BULLETIN, ZONING FOR MINIMUM HOUSE SIZE (Nov. 1952). A useful summary of pertinent authorities appears in CHARLES A. RATHKOPF, THE LAW OF ZONING AND PLANNING 456-464 (2d ed. 1949). Mr. Rathkopf acknowledges this material to be essentially the work of Ralph W. Crolly, Esq.

[26] Reasonableness, of course, must be demonstrable when formulating such a control. Frischkorn Construction Co. v. Lambert, 315 Mich. 556, 24 N.W.2d 209 (1946) does not vitiate this technique although it did strike down one of its specific applications (14,000 cubic feet minimum unreasonable in context of particular neighborhood).

[27] This "floor area ratio" regulation has thus far appeared in but one case in which there was dictum approval. Pritz v. Messer, 112 Ohio St. 628, 635, 644, 149 N.E. 30, 32, 35 (1925). The date of the case indicates the long dormancy of the technique which in 1948 was referred to as "a comparatively recent concept." AMERICAN PUBLIC HEALTH ASSOCIATION, PLANNING THE NEIGHBORHOOD 40 (1948).

[28] Note ". . . that floor area ratios do not reflect population densities, because floor area per person varies (usually increasing as income increases). In order to measure population loads, an additional index of floor area per person should be used. This makes it possible to relate density in terms of floor area ratios to population density." AMERICAN PUBLIC HEALTH ASSOCIATION, PLANNING THE NEIGHBORHOOD 41 (1948).

can, after careful figuring, give the planner a rather accurate idea of the population density allowable in the area in question. Both methods can be applied to commercial and residential districts. Unlike other density controls, each is a direct building restriction which leaves the architect unhobbled by any one external form such as the ziggurat.

The floor area ratio technique is the better of the two. Square footage is a more workable architectural concept than cubage.[29] It is also supplanting cubage in cost estimating.[30] Although neither control is total, floor area ratio requires the fewest number of additional regulations in low density areas. It can be applied to all roofed areas such as breezeways, carports, porches, and tool sheds without special additional provisions.

The final advantage is that, unlike cubage, floor area ratio avoids placing a premium on the intense development of vertical space. Cubage control is really a control of the building shell. Once that maximum is set, the developer has a strong inducement to exploit available space by lowering ceilings in the building. This may have undesirable architectural results.[31]

If many smaller apartments return more to the developer than fewer larger ones,[32] then both cubage and floor area ratio techniques encourage small apartment development. This could be counterbalanced by tying either control to a density regulation based on lot area per family or per dwelling.

III

THE PROTECTION OF LIGHT, AIR, AND PRIVACY

The forces leading to the 1916 passage of the landmark New York Zoning Resolution were manifold. Among these was a strong conviction on the part of the draftsmen and other informed citizens that adequate daylight and fresh air are vital to a decent urban life.[33] In retrospect this may appear an obvious fact. At the time, however, the community was probably not so aware of the axiom as we may like to think we are.

Intense congestion in New York had arisen from high population densities and was working against a good measure of privacy in the lives of great numbers of people. In addition to the unhealthy physical features, the pressures of large numbers of people living in too close contact with each other were causing adverse psychological effects upon family life.

[29] ". . . nobody figures cubage the same twice." Agle, *A New Kind of Zoning*, Architectural Forum, July, 1951, p. 176, at 236, col. 3.

[30] *Id.* at 238.

[31] Low ceilings may give law offices that modish, mid-century look so typical of the latest in advertising agency design, but they also generate serious law library problems. Books, instead of slowly going ceilingward as they accumulate, arrive there much sooner than they would have in fusty, high-ceilinged days. The result is horizontal library expansion and premature space problems. The profession is well counseled here in one great motto of twentieth century architecture: form follows function.

[32] Comment, 60 YALE L. J. 506, 519 (1951) suggests they usually do when the builder has a limited amount of floor area or volume available.

[33] N.Y. COMMISSION ON BUILDING DISTRICTS AND RESTRICTIONS, FINAL REPORT 9, 10, 27, 28, 45, 96, 105, 107, 108, 142, 152, 176-182, 199 (1916).

The need for fresh air, daylight, and privacy is no less important to urban life today than it was in 1916. These are constants, but urban growth and decay are not. Change also occurs in knowledge of standards applicable to the needs.[34] Zoning is one important potential for putting that information to work in urban development. It is not easy to generalize about what has happened to such necessities of life in our cities these last thirty or forty years, but undoubtedly where they have been guarded by zoning regulations protection has too often been mixed up with some other zoning controls, notably set-back and height limitations in high-density areas. Each is an example of one regulation for two tasks, and each mirrors the difficulties raised when one control is expected to do too much. In low density areas yard requirements have been the principal insurance, but they have worked inadequately because of negligible side yard limitations.

Pertinent authority is most scarce although what there is clearly supports the protection of these goals. Light, air, and privacy are valid aspects of the police power.[35]

So far as light and air are concerned, the courts' conception of the police power would appear to be sufficiently broad to cover new techniques which should give more effective protection than hitherto possible. The regulations would operate in a technological setting somewhat different from the earlier days of zoning. Industrial architecture is noticeably shifting away from the dreary multi-story, mill-town forms toward low-slung slabs often set on large plots which afford parking space for workers. The structures frequently receive the amenities of light and air through the fluorescent tube and the air-conditioner. The amenities in modern office buildings often get the same processing. The development of plate glass manufacturing techniques has gone hand in hand with the displacement of brick and stone as the skin on such buildings. In domestic architecture the low cost of ventilating fans, increased louver usage, clerestory windows, skylights, and glass block[36] have made residential design a much more flexible task than it was some years ago.

Two suggested possibilities of control are the "angle of light"[37] and the "daylight factor."[38] The angle of light assures limitations on the vertical angle within which buildings may obstruct light and would likely result in more sunlight at ground levels, better air circulation, improved light on the sides of buldings, and an improved outlook. The angle is drawn from a point, say at street center, toward the restricted structures which may not rise higher than the line of the angle. To avoid

[34] See AMERICAN PUBLIC HEALTH ASSOCIATION, PLANNING THE NEIGHBORHOOD 29-34 (1948).

[35] Gorieb v. Fox, 274 U.S. 603 (1927); Thille v. Board of Public Works of City of Los Angeles, 82 Cal. App. 187, 255 Pac. 294 (1927); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925); State *ex rel.* Morris v. East Cleveland, 22 OHIO N.P. (N.S.) 549, 31 Ohio Dec. 197 (1920); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925); Junge's Appeal (No. 2), 89 Pa. Super. 548 (1927).

[36] Agle, *A New Kind of Zoning,* Architectural Forum, July, 1951, p. 176, col. 3.

[37] See HARRISON, BALLARD AND ALLEN, PLAN FOR REZONING THE CITY OF NEW YORK 45-48 (1950); *New York Rethinks Its City Plan,* Architectural Forum, Sept. 1950, p. 122; Comment, 60 YALE L.J. 506, 520 (1951).

[38] See MINISTRY OF TOWN AND COUNTRY PLANNING, REDEVELOPMENT OF CENTRAL AREAS 43, 95 (1947); Comment, 60 YALE L.J. 506, 520-521 (1951).

possible ziggurat-like effects, the angle may be averaged over a given width of the lot parallel to the street. In addition, the angle would vary from district to district. By allowing an average angle, the architect is free to manipulate the "shoulders" of the building as his design problem may require.

The daylight factor measures indoor daylight as a percentage of daylight available under an unobstructed hemispherical sky. The standard is applied as a stated daylight factor at specific distances from floor and external wall and is then tested against a "permissive height indicator" which comprehends light penetrating either over the top of an obstruction in front of a window or from the side of that obstruction. The great flexibility in the technique is the credit it gives for light coming into a structure past the side of a building rather than over building tops alone.

A third technique would supplement the angle of light (which protects light in the street) by insuring light to all legally required windows in a building. The standard would be a wedge[39] consisting of radii of stated length, say 60 feet, projected from the center line of the window. The wedge encloses a stated angle, say 140 degrees, and ends in an arc. The wedge would be found in the space above some angle, such as 45 degrees, projected from the base of the window. The final element necessary is that the zoning ordinance specify for each district that amount and location of the space within the wedge which must be kept unobstructed. The designer is thus left with a real choice as to how he will so order building courts and walls to fulfill the light wedge requirements.

In multiple dwelling districts privacy is primarily a function of density levels. If they are effectively controlled, too close contact can be avoided. In low density areas, however, privacy is to an important extent governed by those controls which fix the placement of the dwelling on its lot. Minimum yard requirements thus operate in spheres other than light and air. The typical yard provisions place the house in the center of the lot. Outlook and inlook are in all directions.

It has been suggested[40] that central lot placement two hundred years ago would have caused no special loss of privacy for at that time efficiency dictated that all rooms be grouped around a central fireplace core. Small windows and few exposed wall surfaces helped keep down heat loss. The Cape Cod cottage was an appropriate solution. Today, however, this answer is anachronistic in view of perfected insulation and heating systems as well as double glazing.

The placement of the house could be made more flexible by abandoning yard requirements and using the floor area ratio or a less desirable "coverage" requirement which limits the percentage of the lot which the building may cover.

IV

ZONING FOR USABLE OPEN SPACE

Perhaps the most graphic example of what zoning might do for the city is caught

[39] See HARRISON, BALLARD AND ALLEN, PLAN FOR REZONING THE CITY OF NEW YORK 48-49 (1950).

[40] Agle, *A New Kind of Zoning*, Architectural Forum, July, 1951, pp. 176, 177, col. 3, p. 234, cols. 1, 2, 3.

in a hot summer night cityscape of a crowded neighborhood that has no air-conditioned movie, bar, or drugstore.

Zoning controls might assure the urban dweller of usable open space instead of mean strips of concrete of little use to anyone but alley cats. To answer the need assumes a definition of usability. These characteristics have been proposed:[41] usable open space is only that part of the area of a residential lot at ground level which (1) is unoccupied by the principal or accessory buildings, (2) provides open space unobstructed to the sky of minimum prescribed dimensions, (3) is not devoted to service driveways or offstreet parking and/or loading space, etc., (4) is devoted to greenery, drying yards, recreational space, etc., and (5) is available to all occupants of the building.

This requirement, applied on a per dwelling unit basis, might be linked with the floor-area ratio. The per dwelling requirement would diminish as floor area ratio increases. Thus, since multiple dwelling families share open space in common, the amount of space needed by a family in a high density district at a given time can to some extent be provided out of a common pool of space. In low density areas away from the center of the city people forego proximity to central city advantages. Since they do this principally to have open space, there should be some legal insurance that the decision yields what it was assumed it would.

In low density districts only space at ground level or approximately there would be acceptable under the technique. In high density districts balcony and roof space could be given additional credit if they meet certain specifications. Because balconies in multi-story dwellings tend to be immediately accessible to each dwelling, they are preferable to open space on the ground or roof, at least for use by infants and the aged.

Since so little litigation has developed over issues of open space, it is not possible to extract detailed rules. Courts have scarcely mentioned what the functions of open space are and what open space controls they will uphold. To the extent it exists, authority deals generally with zoning problems principally involving minimum yard provisions and non-zoning problems principally involving building line regulations.

Little of the little that has been said about open space goes to the question of usability. These functions of open space controls have been treated by the courts: aesthetics;[42] mitigation of traffic dangers;[43] mitigation of street dust, noise, and fumes;[44] reduction of the spread of fire and conflagration;[45] and assurance of access to light and air.[46]

[41] HARRISON, BALLARD AND ALLEN, PLAN FOR REZONING THE CITY OF NEW YORK 51-53.

[42] Gorieb v. Fox, 274 U.S. 603 (1927). [43] *Ibid.* [44] *Ibid.*

[45] *Ibid.*; Slack v. Building Inspector of Town of Wellesley, 262 Mass. 404, 160 N.E. 285 (1928); R. B. Const. Co. v. Jackson, 152 Md. 671, 137 Atl. 278 (1927); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

[46] Gorieb v. Fox, 274 U.S. 603 (1927); Gordon v. The Board of Appeals of the City of Schenectady, 131 Misc. 346, 225 N.Y.Supp. 680 (Sup. Ct. 1927); R. B. Const. Co. v. Jackson, 152 Md. 671, 137 Atl. 278 (1927).

The most relevant authority is indeed filamentary and is spun into a small handful of cases[47] none of which involves the suggested definition of usability and all of which touch the concept only by inference. As thin as the material is, however, it is likely that on the square issue of validity the usable open space technique would be sustained, for judicial opinion on all of these controls has been most receptive to intelligent new ventures in the field.

CONCLUSION

1. A fresh and inclusive caption is needed for zoning regulations of height, shape, and placement of buildings on the land which are applied to control population density, open space, and access to daylight and air.

2. Building technology and medical knowledge are flowing well in advance of zoning techniques. The disparity has checked the complete use of the resources of science and architecture and left the urban dweller with inadequate protection against overcongestion and diminished access to daylight, air, and open space.

3. Modern zoning techniques promise a fuller protection of those amenities. Many of the measures are as yet untested. Courts, which have until now been receptive to the ends and means of zoning, are likely to receive these recent proposals favorably.

[47] Gorieb v. Fox, 274 U.S. 603, 609 (1927) (comfort); R. B. Const. Co. v. Jackson, 152 Md. 671, 677, 137 Atl. 278, 281 (1927) (pleasure and comfort); Pritz v. Messer, 112 Ohio St. 628, 643, 149 N.E. 30, 35 (1925) (recreation); Brett v. Building Commissioner of Brookline, 250 Mass. 73, 79, 145 N.E. 269, 271 (1924) (recreation); State *ex rel.* Morris v. East Cleveland, 22 Ohio N.P. (N.S.) 549, 555, 31 Ohio Dec. 197, 203 (1920) (recreation).

DISCRETIONARY POWERS OF THE BOARD OF ZONING APPEALS

JOHN W. REPS*

The adoption of the first comprehensive zoning regulations by New York City in 1916 began a new era in public regulation of private property. It also resulted in the creation of an agency new to local government—the board of zoning appeals, an administrative tribunal with quasi-judicial and quasi-legislative powers. Under the influence of the New York experience and stimulated by the preparation in 1922 of the model *Standard State Zoning Enabling Act*[1] by the United States Department of Commerce, state legislatures throughout the country soon enacted enabling legislation for zoning. Virtually all of these statutes provided for a board of appeals with three main functions. The Standard Act, followed closely by a majority of the states, specified the powers of the board in these words:[2]

> 1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.
>
> 2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
>
> 3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

The first of the powers—review of administrative action and interpretation of ordinance provisions—has not been the source of widespread difficulties. In an appeal of this type the board does not exercise discretionary authority; instead, the board must act as if it were the administrative official to which the original permit application was submitted.

The real problems arise from the separate but related powers of the board to grant variances and special exceptions. The differences between the two should be clear enough, but they are often confused by boards of appeals and occasionally by the courts. This confusion is compounded by the practice in some states of requesting both types of permits in a single appeal.[3]

Briefly, a variance is a permit granted by the board of appeals where it finds

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[1] U. S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (Preliminary ed. 1922, rev. ed. 1926).

[2] *Id.*, §7.

[3] Montgomery County v. Merlands Club, 202 Md. 279, 96 A.2d 261 (1953).

the applicant suffering unnecessary hardship because of special conditions. A special exception permit is for a use identified in the ordinance but which can be authorized only by action of the board.[4]

I

THE BOARD OF APPEALS: SAFETY VALVE OR LEAK IN THE BOILER?

Probably no other figure of speech has been so overworked as the comparison of the board of appeals to a "safety valve," designed to prevent some legal explosion. In the early days of zoning this was often mentioned as the main reason for the existence of the board.[5] If early appeals boards were not actually encouraged to grant appeals liberally, they at least were not unduly restrained from doing so in doubtful cases with this attitude as the prevailing philosophy.

It is true that the explosion has not occurred, but there is plenty of evidence also that there isn't much steam left in the boiler. As one experienced observer has commented,[6]

> Every improperly granted special permit, every adjustment, which is in effect an instance of spot zoning, is a leak in the zoning ordinance. And it doesn't take very many such leaks to exhaust the strength of the zoning plan. Even if the excess densities, or the fudging on yard and area requirements or, mayhap, the change of use, permitted by improper actions of the board of appeals do not greatly affect the broad land use and density pattern (if any) of the master plan, they do start a disintegration of the zoning plan, and they do undermine confidence in its integrity.

No comprehensive survey has been made of the activities of zoning boards of appeals, but enough comparative information exists to show the alarming number of appeals granted in many of our cities. While mere numbers are not proof of improper action they are certainly grounds for suspicion. In Cincinnati from 1926 through 1937, the board of appeals granted 1,493 variances out of 1,940 requests. In Cleveland from 1929 through 1937, 1,289 out of 2,307 variance requests were granted. In Denver from 1925 through 1937 there were 1,516 variance applications, of which 893 were granted. In Philadelphia during the period 1933-1937 the board of adjustment granted 4,000 appeals out of 4,800 cases appearing before the board.[7]

More recent data show the number of variances approved in twenty cities during 1946. For example, in Austin out of 358 applications, 240 were granted; in Mil-

[4] For cases distinguishing between variances and exceptions, see Mitchell Land Co. v. Planning and Zoning Board, 140 Conn. 527, 102 A.2d 316 (1953); Stone v. Cray, 89 N.H. 483, 200 Atl. 517 (1938); Dunham v. Zoning Board of Town of Westerly, 68 R.I. 88, 26 A.2d 614 (1942); Application of Devereux Foundation, 351 Pa. 478, 41 A.2d 744 (1945); Hickox v. Griffin, 298 N.Y. 365, 83 N.E.2d 836 (1949); Carson v. Board of Appeals of Lexington, 321 Mass. 649, 75 N.E.2d 116 (1947).

[5] For example, see Baker, *The Zoning Board of Appeals*, 10 MINN. L. REV. 277, 280 (1926): "The chief value of the board of appeals in zoning is in protecting the ordinance from attacks upon its constitutionality."

[6] Pomeroy, *Losing the Effectiveness of Zoning Through Leakage*, Planning and Civic Comment, Oct. 1941, pp. 8-9.

[7] AMERICAN SOCIETY OF PLANNING OFFICIALS, ZONING CHANGES AND VARIANCES, BULL. No. 43 (April, 1938).

waukee 121 out of 163; in Pasadena 475 out of 586; in Rochester 230 out of 325.[8] Another source reveals that in Chicago from 1923 to 1953, the board of appeals granted 4,260 variances, and more than half of these were awarded since the comprehensive zoning amendment in 1942.[9]

Whether through ignorance of the law, political influence, the belief that mistakes in legislation can be cured through administrative relief, or magnification of power for purposes of prestige, the board of appeals in many cities has become a device of danger rather than safety. Certainly the granting of unjustified permits is one of the causes of urban blight and decay in existing neighborhoods.[10] Granting of only a few unwarranted permits in undeveloped areas may also prevent sound growth at the city's fringe. Land acquisition costs for community improvements may be increased by inflation of condemnation awards which take into account more intensive uses allowed by improper permits.[11] Moreover, since these special permits do not appear on the zoning map, it is difficult for the average citizen to know exactly what land use regulations are operative in his neighborhood. This "hidden zoning" is unfair and will eventually undermine confidence in the protection that zoning is supposed to bring. Undeserved permits to which the board has attached conditions also mean additional administrative costs if essential periodic inspections are made to see that the conditions are being upheld.[12] Finally, the use of zoning as a positive and thus necessarily strict measure to aid in comprehensive city replanning is impossible if the board of appeals constantly creates new problems of land use.[13]

II

THE POWER TO ISSUE VARIANCES IN CASES OF HARDSHIP

What is the extent and what are the limitations of the variance power? It is obviously impossible to provide an answer valid in every state. What the writer has attempted is the statement of a thesis buttressed by decisions selected for the most part from a few eastern states.

The fundamental requirements for a variance are succinctly stated in the often cited opinion in *Otto v. Steinhilber*:[14]

[8] *Administration of Zoning Variances in 20 Cities*, 30 PUBLIC MANAGEMENT 70 (1948); See also AMERICAN SOCIETY OF PLANNING OFFICIALS, MEASURES OF VARIANCE ACTIVITY, PLANNING ADVISORY SERVICE INFORMATION REP. No. 60 (1954).

[9] Comment, *Zoning Amendments and Variations and Neighborhood Decline in Illinois*, 48 N. W. L. REV. 470, 481 (1953).

[10] *Ibid.*

[11] Moyerman v. Koons, 80 Pa. D. & C. 63 (C.P. 1952).

[12] In Mitchell Land Co. v. Planning and Zoning Board of Appeals, *supra* note 4, five of the nine conditions specified would require almost daily inspection. For cases dealing with the legality of conditional permits, see Reps, *Legal and Administrative Aspects of Conditional Zoning Variances and Exceptions*, 2 SYRACUSE L. REV. 54 (1950).

[13] Heady v. Zoning Board of Appeals of Milford, 139 Conn. 463, 467, 94 A.2d 789, 791 (1953): ". . . unless great caution is used and variations are granted only in proper cases, the whole fabric of town- and city-wide zoning will be worn through in spots and raveled at the edges until its purpose in protecting property values and securing an orderly development of the community is completely thwarted."

[14] 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939), *rehearing denied*, 282 N.Y. 681, 26 N.E.2d 811 (1940).

Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

These three basic requirements for a proper variance will be examined in more detail.

1. *There must be proof of hardship.*

(a) There must be proof of inability to make reasonable use of the property for a purpose or in a manner authorized by the zoning ordinance. The New Jersey Supreme Court stated its rule for determining hardship in *Beirn v. Morris:*[15]

The inquiry is whether the use restriction, viewing the property in the setting of its environment, is so unreasonable as to be confiscatory.

In *Devaney v. Board of Zoning Appeals of New Haven,*[16] the Connecticut court defines conditions of hardship as

. . . situations where the application of zoning to a particular property greatly decreases or practically destroys its value for any permitted use and the application of the ordinance bears so little relationship to the purposes of zoning that, as to that property, the regulation is in effect confiscatory or arbitrary. . . .

And in *Calcagno v. Town Board of Webster,*[17] there was a similar ruling:

The petitioners, in order to become entitled to a variance, must show factors sufficient to constitute such a hardship as would in effect deprive them of their property without compensation.

See also: Application of Devereux Foundation, 351 Pa. 478, 484, 485, 41 A.2d 744, 747 (1945): "Mere hardship is not sufficient; there must be *unnecessary* hardship. . . . Moreover, the power given by the statute and by the ordinance to authorize a variance is limited by the provision that it must be such 'as will not be contrary to the public interest' . . ."; Walton v. Tracy Loan & Trust Co., 97 Utah 249, 255, 256, 92 P.2d 724, 727 (1939): "The conditions fixed by statute . . . under which the Board may grant a variance are: (a) It must not be contrary to the public interest . . . (b) there must be special conditions, that is, conditions not applying or that would not apply to other lands in the vicinity; (c) due to said special conditions a literal, that is, rigid or strict enforcement of the provisions of the building ordinances, must result in unnecessary hardship . . . (d) but even with all the foregoing conditions present the spirit of the ordinance must be observed . . ."; and Brackett v. Board of Appeal of Boston, 311 Mass. 52, 60, 39 N.E.2d 956, 961 (1942): ". . . All relevant factors, when taken together, must indicate that the plight of the premises in question is unique in that they cannot be put reasonably to a conforming use because of the limitations imposed upon them by reason of their classification in a specified zone. When this appears, the further question has to be determined, whether desirable relief may be granted without substantially derogating from the intent and purpose of the zoning law, but not otherwise."

[15] 14 N.J. 529, 103 A.2d 361, 364 (1954). See also Leimann v. Board of Adjustment, 9 N.J. 336, 342, 88 A.2d 337, 339 (1952): "The statute contemplates proof that the property . . . cannot reasonably be put to the permitted use. . . ."

[16] 132 Conn. 537, 543, 45 A.2d 828, 830 (1946).

[17] 265 App. Div. 687, 689, 41 N.Y.S.2d 140, 142 (4th Dep't 1943), *aff'd mem.*, 291 N.Y. 701, 52 N.E.2d 592 (1943).

It is not sufficient proof of hardship to show that greater profit would result if the variance were awarded. In the leading North Carolina decision of *Lee v. Board of Adjustment of Rocky Mount*,[18] the application was for the establishment of a grocery store and gasoline station in a residential district. There was no evidence that the property could not be reasonably devoted to residential purposes, and the court stated:

> It is erroneous to base a conclusion that the denial of an application would work an unnecessary hardship because the applicant could earn a better income from the type of building proposed.

This general rule has been adhered to in numerous decisions.[19] What facts are sufficient to demonstrate inability to make reasonable use of the property for a permitted use vary widely from state to state. Detailed analysis of decisions on this point would be a useful study.[20]

(b) The hardship complained of cannot be self-created. For example, in *Selligman v. Von Allmen Brothers*[21] the owner of a non-conforming milk bottling plant was ordered to put on a new roof by the health authorities. A permit was obtained and work started, but it was discovered that the old wooden walls were not structurally sound. The owner proceeded to construct brick walls without a permit. When the work was nearly completed the building inspector halted construction, and a permit was refused on the grounds the new walls constituted structural alterations of a non-conforming building. The board of appeals refused to issue a variance to permit completion of the job. The owner maintained he was suffering unnecessary hardship, but the court held:

> . . . appellee created the situation which it now complains is working the hardship in that it razed the frame walls and started replacing them with brick under a permit which allowed it only to repair the roof. It should have sought a variation from the Board and a permit from the Building Inspector before commencing this work. One cannot proceed in the face of building restrictions or of zoning laws and then complain that a great hardship is being imposed upon him when not allowed to complete the work.

This proposition also seems one that is generally supported in other jurisdictions.[22]

[18] 226 N.C. 107, 110, 37 S.E.2d 128, 131 (1946).

[19] See People *ex rel.* Werner v. Walsh, 212 App. Div. 635, 640, 209 N.Y. Supp. 454, 458 (1st Dep't 1925), *aff'd*, 240 N.Y. 689, 148 N.E. 760 (1925): "The mere fact that a garage is more profitable than any other structure is not sufficient evidence of hardship"; Thayer v. Board of Appeals, 114 Conn. 15, 22, 157 Atl. 273, 275 (1931): "Disadvantage in property value or income, or both, to a single owner of property, resulting from application of zoning restrictions, does not, ordinarily, warrant relaxation in his favor on the ground of practical difficulty or unnecessary hardship"; Beirn v. Morris, *supra* note 15, 14 N.J. at 534-535, 103 A.2d at 363: ". . . profit motive is not an adequate ground for a variance."

[20] For a comparison of a number of decisions on the nature of proof of hardship, see PHILIP P. GREEN, JR., ZONING IN NORTH CAROLINA 343-353 (1952).

[21] 297 Ky. 121, 126, 179 S.W.2d 207, 210 (1944).

[22] Piccolo v. West Haven, 120 Conn. 449, 181 Atl. 615 (1935); National Lumber Products Co. v. Ponzio, 133 N.J.L. 95, 42 A.2d 753 (1945).

(c) Hardship cannot be claimed by one who purchases with knowledge of restrictions. In *Clark v. Board of Zoning Appeals of Hempstead*,[23] the court invalidated a variance permitting the use of a residence as a funeral home. The property had been purchased a few years previously, and the residential zoning classification had remained unchanged. The court ruled:

> . . . one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of "special hardship."

While other decisions follow this same rule,[24] some hold that the fact of purchase with knowledge of restrictions is not wholly conclusive but merely persuasive in showing lack of hardship.[25]

(d) The hardship must result from the application of the ordinance. The property in *Brackett v. Board of Appeal of Boston*[26] was in a general residence district where multiple dwellings, clubs, hotels, and other similar uses were permitted. A restriction in the deed, however, prohibited any building other than a single-family residence. The owner, a hotel corporation, had requested and was awarded a variance to use the land as a parking lot. In invalidating the action of the board, the court observed:

> . . . it would seem that the board had in mind the disadvantage of the corporation arising from the restriction upon its lot, rather than any disadvantage attributable to the fact that the premises are zoned in a general residence district. In short, apart from the fact that the premises in question are restricted to a single family dwelling, there is no finding that there are any other conditions that render the premises unsuitable for residential and other uses permissible under the zoning law. . . .

Other decisions in New York and Rhode Island are in accord with this principle.[27]

(e) The hardship complained of must be suffered directly by the property in question. Applicants frequently come before boards of appeals arguing that the lack of their proposed use in the neighborhood constitutes a hardship on the residents which should be relieved. This argument was rejected in *Brackett v. Board of Appeal of Boston* (*supra* note 26), previously discussed, where it was urged that provision of a parking lot would help to relieve the "hardship" of traffic congestion

[23] 301 N.Y. 86, 92 N.E.2d 903 (1950).

[24] Matter of Henry Steers v. Rembaugh, 259 App. Div. 908, 20 N.Y.S.2d 72 (2d Dep't 1940), *aff'd*, 284 N.Y. 621, 29 N.E.2d 934 (1940); Devaney v. Board of Zoning Appeals of New Haven, *supra* note 16.

[25] Coble Close Farm v. Board of Adjustment, 10 N.J. 442, 92 A.2d 4 (1952); Application of Devereux Foundation, *supra* note 14; Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece, 271 App. 33, 60 N.Y.S.2d 750 (4th Dep't 1946). See also 293 North Broadway Corp. v. Lange, 282 App. Div. 1056, 126 N.Y.S. 2d 374 (2d Dep't 1953): "Although one who purchases land with knowledge of a use restriction will not be permitted to claim special hardship . . . that rule does not apply to a variance of an area restriction."

[26] 311 Mass, 52, 58, 39 N.E.2d 956, 960 (1942).

[27] Hickox v. Griffin, 298 N.Y. 365, 83 N.E.2d 836 (1949); Winters v. Zoning Board of Review, 96 A.2d 337, 340 (R.I. 1953): ". . . hardship . . . is one resulting from restricted use of petitioner's land by virtue of the terms of the ordinance, and not personal hardship growing out of petitioner's physical infirmities."

in the neighborhood. Similarly, in *Young Women's Hebrew Ass'n v. Board of Standards and Appeals*[28] the court dismissed the contention that a "hardship" within the meaning of the zoning law would be relieved by allowing a gasoline station on one side of a street where no other station existed, so that south-bound traffic would not be forced to cross to the opposite side of the street to reach an existing station.

2. *There must be proof of unique circumstances.*

While the existence of hardship may be proved by the applicant, that alone is not sufficient, since hardship may result from either of two reasons:[29]

> . . . the fault may lie in the fact that the particular zoning restriction is unreasonable in its application to a certain locality, or the oppressive result may be caused by conditions peculiar to a particular piece of land.

The board of appeals has authority to grant relief only where the hardship arises out of special conditions inherent in the property itself. If the hardship is general, that is, shared by neighboring property, relief can be properly obtained only by legislative action or by court review of an attack on the validity of the ordinance.

Thus in *People* ex rel. *Arverne Bay Construction Co. v. Murdock*,[30] while the court was sympathetic to the claim of hardship by an owner who wished to establish a commercial use in an undeveloped area restricted to residential purposes, refusal of the variance by the board was sustained,

> . . . the conditions complained of, and particularly the presence of odors emanating from an incinerator and a creek used as an outlet for a sewer, are not peculiar to the site in question, but affect a wide area. . . . Under these circumstances, there was no showing of unnecessary hardship or practical difficulty applicable peculiarly to the site in question, and relief, if any, should be achieved through appeal to the legislative authority which created the zone.

Other decisions in New York, Massachusetts, Connecticut, and New Jersey, among others, have followed this ruling.[31]

[28] 266 N.Y. 270, 194 N.E. 751 (1935).

[29] Otto v. Stenhilber, *supra* note 14, 282 N.Y. at 75, 24 N.E. at 852.

[30] 247 App. Div. 889, 286 N.Y.Supp. 785, 786 (2d Dep't 1936), *aff'd mem.*, 271 N.Y. 631, 3 N.E.2d 457 (1936).

[31] Levy v. Board of Standards and Appeals, 267 N.Y. 347, 196 N.E. 284 (1935); Young Women's Hebrew Ass'n v. Board of Standards and Appeals, *supra* note 28; Ostrove v. Cohen, 269 App. Div. 1054, 58 N.Y.S.2d 900 (2d Dep't 1945), *leave to appeal denied*, 270 App. Div. 818, 60 N.Y.S.2d 295 (1946); Hickox v. Griffin, *supra* note 27; Brackett v. Board of Appeal of Boston, *supra* note 26, 311 Mass. at 58, 39 N.E.2d at 960: "If there is a general hardship, this situation may be remedied by revision of the general regulation, and not by granting a special privilege of a variation to single owners"; Lumund v. Board of Adjustment, 4 N.J. 577, 582-583, 73 A.2d 545, 548 (1950): ". . . a finding of 'unnecessary hardship' to an individual owner, due to 'special conditions' is a *sine qua non* to the exercise of the board of adjustment's authority to grant a variance from the terms of the ordinance, and . . . if the difficulty is common to other lands in the neighborhood so that the application of the ordinance is general rather than particular, the remedy lies with the local legislative body or in the judicial process . . ."; Devaney v. Board of Zoning Appeals of New Haven, *supra* note 16, 132 Conn. at 541-542, 45 A.2d at 830: ". . . the use of the adjective 'unnecessary' in modification of 'hardships' . . . can only be related to those hardships which do not follow as the ordinary results of the adoption of the zoning plan as a whole."

This principle is of critical importance. Even in those states where opinions on this point have been most numerous and consistent, there have been occasional questionable decisions in the highest courts.[32] And in these same states some lower courts and many boards of appeals consistently ignore the fundamental requirement of unique circumstances. In other states the highest courts have strangely overlooked this principle, upholding variance permits on the grounds of hardship in situations where the alleged hardship was plainly shared by adjacent property.[33]

There are convincing reasons why this principle should be followed. As the New York court has observed,[34]

> Equality of privileges is a basic principle of government. To cure by exemption in his case the loss resulting to one owner from general deterioration of a neighborhood is to depreciate the adjacent properties of other owners, and is unjust also to those whose properties remain subject to the same restriction in other localities likewise impaired.

Moreover, violation of this concept allowing relief only in exceptional and unique circumstances would strike at the basic authority of the legislative body to determine the proper classification of zoning districts. Thus, in invalidating a variance granted where heavy traffic and general conditions in the vicinity made the location unsuitable for a permitted use, the court in *Levy v. Board of Standards and Appeals*[35] stated:

> No power has been conferred . . . to review the legislative general rules regulating the use of land. . . . The board does not exercise legislative powers. It may not determine what restrictions should be imposed upon property in a particular district. It may not review the legislative general rules regulating the use of land. It may not amend such general rules or change the boundaries of the districts where they are applicable. Its function is primarily administrative. . . . Its power is confined to relief in proper cases from hardship unnecessarily caused by application of a general restriction to a particular piece of land. It may not destroy the general restriction by piecemeal exemption of pieces of land equally subject to the hardship created in the restriction, nor arbitrarily grant to an individual a special privilege denied to others.

No hard and fast rule can be formulated as to what reviewing courts will regard as satisfactory proof of unique circumstances. In *Hammond v. Board of Appeals*,[36] the court decided "with hesitation" that a residence in an area of mixed stores and homes, located near a number of non-conforming business uses, and incapable of

[32] See, for example, the early New York opinion in People *ex rel.* St. Albans-Springfield Corp. v. Connell, 257 N.Y. 73, 177 N.E. 313 (1931), where the hardship was clearly general, and the recent New Jersey case of 165 Augusta Street v. Collins, 9 N.J. 259, 264, 87 A.2d 889, 891 (1952), where existing business uses in the vicinity and the division of a lot by the zone boundary line were deemed to constitute an "extraordinary and exceptional situation or condition of the property." Justice Heher's vigorous dissenting opinion should be carefully studied.

[33] Triolo v. Exley, 358 Pa. 555, 57 A.2d 878 (1948); Messenger v. Zoning Board of Review, 99 A.2d 865 (R.I. 1953). In both decisions the courts cited conditions of the *neighborhood* in justifying the grant of special privilege.

[34] Young Women's Hebrew Ass'n v. Board of Standards and Appeals, *supra* note 28, 266 N.Y. at 276, 194 N.E. at 753.

[35] *Supra* note 31, 267 N.Y. at 352-353, 196 N.E. at 286.

[36] 257 Mass. 446, 154 N.E. 82 (1926).

being rented as a house, was so uniquely situated as to warrant a variance for its conversion to a retail store. And in *Dooling's Windy Hill, Inc. v. Zoning Board of Adjustment*,[37] the court seemed to rely on such irrelevant matters as the suitability of the property for its proposed hotel use and the "trend . . . toward increasing commercialization" of the immediate vicinity.

On the other hand, the New Jersey court now requires compelling proof of unique circumstances. In *Beirn v. Morris*,[38] the property was the first interior lot north of an acute-angle intersection. Immediately to the north was a fire station. Adjoining on the south in the apex of the triangle formed by the streets was a gasoline station. Another gasoline station was across the street. Real estate experts testified that the lot was unsuitable for a residence and that few houses had been erected in the vicinity since the fire station was built twenty years previously. The court regarded these facts as insufficient evidence of hardship not shared by others. Further analysis of this point would be a valuable contribution to zoning knowledge.

3. *There must be proof that the proposed use would not alter the essential character of the neighborhood.*

The applicant for a variance who is able to prove hardship as well as unique circumstances must still satisfy a final requirement. The board must find that the use, if allowed, would not effect a substantial change in the character of the district or be in conflict with the general intent of the zoning law. The recent decision in *Rexon v. Board of Adjustment of Haddonfield*[39] illustrates this principle. The property was in the interior of a block, parts of which were residential. The building was used for a machine shop that the appellant wished to enlarge substantially. The courts held the land could reasonably be used for conforming purposes, adding:

> Moreover . . . relief is not to be granted . . . unless it may be done without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zoning plan. The evidence pointing to a serious threat to the health and well being of the citizens of this residential community from the continuance of plaintiff's factory operation fully supports the local board's finding that a variance could not be granted without substantial detriment to the public good. . . .

Many other decisions in New Jersey, Connecticut, Massachusetts, and New York are in general agreement.[40]

[37] 371 Pa. 290, 295, 89 A.2d 505, 507 (1952).

[38] *Supra* note 15.

[39] 10 N.J. 1, 8, 89 A.2d 233, 236 (1952).

[40] Leimann v. Board of Adjustment, *supra* note 15; Heady v. Zoning Board of Appeals of Milford, *supra* note 13, 139 Conn. at 468, 94 A.2d at 791: "A variance should not be granted unless it is in harmony with the general purpose and intent of the zoning ordinance"; Prusik v. Board of Appeal of Boston, 262 Mass. 451, 457, 160 N.E. 312, 314 (1928): "Exceptional circumstances alone justify relaxation in peculiar cases of the restrictions imposed by the statute. The dominant design of any zoning act is to promote the general welfare. . . . The stability of the neighborhood and the protection of property of others in the vicinity are important considerations"; Holy Sepulchre Cemetery v. Board of Appeals of Greece, *supra* note 25, 271 App. Div. at 41-42, 60 N.Y.S.2d at 756: "Assuming . . . that petitioner did show generally a peculiar situation, not of its own creation, which will result

In those states adhering to the rule requiring proof of hardship, a showing that such hardship is due to unique circumstances, and a showing that the relief of the hardship must not alter the essential character of the locality, a variance allowing an otherwise prohibited *use* can rarely be justified. The highest courts in these states are reluctant to uphold variances except for modifications in yard, height, or lot area requirements. In another group of states, chiefly in the mid-west, courts have made a complete prohibition of *use* variances explicit. In the leading North Carolina decision the court based this prohibition on the doctrine of maintaining the spirit of the ordinance:[41]

> No power to convert a residential section into a business district . . . is conferred. Therefore it cannot permit a type of business or building prohibited by the ordinance, for to do so would be an amendment of the law and not a variance of its regulations. . . .
>
> As the new building and its use must harmonize with the spirit and purpose of the ordinance . . . no variance is lawful which does precisely what a change of map would accomplish. . . . Action to that effect is in direct conflict with the general purpose and intent of the ordinance and does violence to its spirit.

And in *Nicolai v. Board of Adjustment of Tucson*,[42] the Arizona Supreme Court, citing similar decisions from Utah, Oklahoma, Texas, Missouri, North Dakota, and Iowa, ruled that use variances were not valid.

III

THE BOARD OF APPEALS AND SPECIAL EXCEPTIONS

Most zoning statutes authorize the board of appeals to grant permits for uses which are listed in the zoning ordinance and which are not authorized as a matter of right but only on special permit. These "use permits" (less exactly but more commonly termed "special exceptions") are intended as an effective method of exercising control over certain exceptional or unusual uses of land and buildings. Special exception uses often include sanitariums, hospitals, cemeteries, airports, public utility structures, and other uses, not likely to occur in great numbers, but potentially troublesome in their impact on surrounding property, and for which it is difficult to prepare specific regulations adequate in all cases. Other situations frequently regulated by the special exception device are extensions or alterations of nonconforming uses, conversion of old and large single-family houses to apartments, temporary permits for otherwise prohibited uses in undeveloped areas, and location of certain types of heavy industry.

Under the Standard Act, and enabling statutes similarly worded, authorization

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in unnecessary hardship to it if the ordinance be enforced, still the board was not obligated, on that score alone, to grant the variance. On the contrary, it was required to balance such hardship against the equities, namely, to what extent the variance would interfere with the whole zoning plan and the rights of owners of other property"; Matter of Taxpayers' Association of South East Oceanside v. Board of Appeals of Hempstead, 301 N.Y. 215, 93 N.E.2d 645 (1950).

[41] Lee v. Board of Adjustment of Rocky Mount, *supra* note 18, 226 N.C. at 112, 37 S.E.2d at 132-133.

[42] 55 Ariz. 283, 101 P.2d 199 (1940).

for special exceptions is unaccompanied by the qualifying or limiting language found in provisions authorizing variances. Most statutes simply allow the legislative body to delegate this power to the board under such conditions and guided by such standards as are considered appropriate. Generalizations on the scope of board of appeals authority in granting special exceptions are dangerous, since ordinance provisions vary so widely even among municipalities in a single state. The following general principles are advanced with some hesitation because of this lack of standardization in the special exceptions sections of existing ordinances.

1. *The special exception use must be listed in the ordinance and jurisdiction over it granted to the board.*

In the section of the ordinance specifying the powers of the board, the specific uses over which it has jurisdiction will usually be listed. In other ordinances these uses will appear among the list of permitted uses in the sections dealing with district regulations, and will be accompanied by some statement that the board of appeals must pass on permit applications for such uses. Only the uses identified in the ordinance may be permitted as special exceptions.

In at least one state—Rhode Island—many communities follow a different and disturbing practice. Here, instead of, or in addition to, a list of particular special exception uses, ordinances frequently contain a grant of authority for the board to,[43]

> . . . approve in any district an application for any use or building deemed by the said Board to be in harmony with the character of the neighborhood and appropriate to the uses or buildings permitted in such district.

The results of this practice have been a deluge of applications for exceptions and a growing lack of certainty that zoning restrictions will not be subverted by arbitrary action of an administrative board.

2. *The board must make findings of fact consistent with ordinance provisions.*

Most special exception sections contain some kind of statement intended as a general guide applying to all listed special exception uses. Typical of one type of provision is the following clause limiting the grant of an exception to situations,[44]

> . . . when in the judgment of the Board such special exceptions and grants and decisions shall be in harmony with the general purpose and intent of the zone plan . . . and will not tend to affect adversely the use and development of neighboring properties and the general neighborhood. . . .

Here it would appear the board must follow one of the rules for variances discussed previously: namely, that the proposed use would not alter the essential character of the locality. Note that no showing of hardship is required, nor proof of unique circumstances—only that the proposed use will not have an "adverse" effect in the vicinity and will be in "harmony" with the general purposes of the ordinance. The board must attempt to measure each application by this elastic yardstick.

[43] Harrison v. Zoning Board of Review of Pawtucket, 74 R.I. 135, 138, 59 A.2d 361, 363 (1948).
[44] Montgomery County v. Merlands Club, *supra* note 3, 202 Md. at 283, 96 A.2d at 263-264.

Another type of special exception provision includes an additional requirement, more positive in character although not necessarily capable of more precise definition. In ordinances of this type the board must find that if the proposed use is approved,[45]

> . . . the public convenience and welfare will be substantially served. . . .

If this phrase has any real meaning, it adds an additional burden on an administrative body ill-equipped to make intelligent decisions in this area. The determination of whether or not a proposed use is needed in a particular district surely lies with the local planning agency. This is a possible modification in the handling of special exceptions that deserves further investigation.

There is yet another frequently encountered ordinance provision with which the board must comply. In *Matter of Underhill v. Board of Appeals of Oyster Bay*,[46] the ordinance provided that

> . . . The Board of Appeals may in a specific case after public notice and hearing *and* subject to appropriate conditions and safeguards, authorize special exceptions.

The permit was invalidated because the board failed to specify conditions and safeguards. Although many ordinances *authorize* conditions and safeguards, not all are worded so that they are apparently mandatory. In cases where this point has been raised, and where the ordinance was similarly phrased, decisions have followed that above.[47]

3. *Adequate standards must be specified in the ordinance to guide the board.*

Authorization for the board of appeals to grant variances and exceptions is a delegation of legislative power, valid only if accompanied by a standard or rule of conduct sufficiently precise to guide the board. The statutory rule of "unnecessary hardship," as a guide for variances, has been generally upheld as adequate. Since statutory authorization for special exceptions is rarely accompanied by any standard or rule, this must be provided in the ordinance.

In New York special exception provisions containing no standards, even general ones, have been held unconstitutional.[48] There is some doubt about the validity of general standards. In *Matter of Underhill v. Board of Appeals of Oyster Bay*,[49] the ordinance listed certain exception uses, preceded by a grant of power to the board to authorize such uses, when in its judgment, the

[45] Miriam Hospital v. Zoning Board of Providence, 67 R.I. 295, 297, 23 A.2d 191, 192 (1941). In this ordinance the clause quoted was made an alternative requirement to a finding that the proposed use would not be detrimental to the neighborhood.

[46] 72 N.Y.S.2d 588, *aff'd mem.*, 273 App. Div. 788, 75 N.Y.S.2d 327 (2d Dep't 1947), *aff'd mem.*, 297 N.Y. 937, 80 N.E.2d 342 (1948). (Italics supplied.)

[47] Strauss v. Zoning Board of Warwick, 72 R.I. 107, 48 A.2d 349 (1946); Youngs v. Zoning Board of Appeals of Norwalk, 127 Conn. 715, 17 A.2d 513 (1941).

[48] Little v. Young, 82 N.Y.S.2d 909, *aff'd*, 274 App. Div. 1005, 85 N.Y.S.2d 41 (2d Dep't 1948), *aff'd*, 298 N.Y. 918, 85 N.E.2d 61 (1949); and Concordia Collegiate Institute v. Miller, 301 N.Y. 189, 93 N.E.2d 632 (1950).

[49] *Supra* note 46, 72 N.Y.S.2d at 593, 594.

public convenience and welfare will be substantially served [and] the appropriate use of neighboring property will not be substantially or permanently injured. . . .

In holding this an unconstitutional delegation of power, the court said:

The preamble is too general in its terms to be claimed to be any attempt to lay down any standards . . . a delegation of legislative power to an administrative officer is not brought within the permissible limits of such delegation by prescribing the public good as the standard. . . .

However, in the more recent decision in *Aloe v. Dassler*,[50] the ordinance authorized the board to permit certain listed uses,

. . . after taking into consideration the public health, safety and general welfare and subject to appropriate conditions and safeguards.

This provision was sustained by the court:

The provisions of the zoning ordinance under review confer no power on the Board of Appeals which may not be lawfully delegated to an administrative body. Standards are provided which, though stated in general terms are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers.

In *Sellors v. Town of Concord*,[51] the Massachusetts court similarly sustained a general standard in an ordinance authorizing listed exceptions if the board found "that such use is not detrimental or injurious to the neighborhood."

The Rhode Island court also accepts standards written in general terms, but apparently requires a more affirmative rule that the proposed exception use is needed in the neighborhood. In *Flynn v. Zoning Board of Review of Pawtucket*,[52] the ordinance permitted the board to

. . . approve in any district an application for any use or building deemed by the said Board to be in harmony with the character of the neighborhood and appropriate to the uses or building permitted in such district.

For the first time in that state an attack was made on the validity of such a sweeping delegation of legislative power. The court refused to uphold the ordinance, observing:

By virtue of this provision the council purported to authorize the board not only to exercise its discretion on any application for exception but also empowered the board to fix the limits of that discretion as it deemed desirable in accordance with its own undisclosed standards and unqualified judgment.

The following year the same court, in *Woodbury v. Zoning Board of Warwick*,[53] reviewed an ordinance authorizing unspecified exceptions,

[50] 278 App. Div. 975, 106 N.Y.S.2d 24, 25 (2d Dep't 1951), *aff'd*, 303 N.Y. 878, 105 N.E.2d 104 (1952).
[51] 329 Mass. 259, 261, 107 N.E.2d 784, 785 (1952).
[52] 77 R.I. 118, 123, 125, 73 A.2d 808, 811, 812 (1950).
[53] 78 R.I. 319, 321, 82 A.2d 164, 165, 167 (1951).

. . . where the exception is reasonably necessary for the convenience and welfare of the public.

The ruling in the *Flynn* case was held inapplicable because the legislative body,

. . . fixed a limitation upon the exercise of the board's discretion and did not give it absolute power to act. Such limitation was that a special exception could be made only when the board found that it was reasonably necessary for the convenience and welfare of the public.

These decisions, and those in other states, make it clear that standards must be specified in the ordinance and must be capable of reasonable interpretation.[54] A fruitful line of inquiry would be an exploration of the limits of acceptability of standards written in general terms.

IV

LEGISLATIVE VARIANCES AND EXCEPTIONS

No treatment of the board of appeals would be complete without some discussion of "legislative" variances or exceptions—applications which are reviewed by the board but which require legislative confirmation before they are effective. This device has been used in several states, including California where the statute failed to provide for a board of appeals, and Illinois after the decision in *Welton v. Hamilton*[55] rendered invalid the standard of "unnecessary hardship" for variances. In New Jersey the 1928 legislation provided for legislative variances in the case of proposed uses more than 150 feet from a district in which such a use was permitted. In *Brandon v. Montclair*,[56] the New Jersey court ruled that a showing of hardship was necessary for a variance of this type.

In 1948 the board of appeals section of the New Jersey statutes was amended, and legislative variances were authorized in any district "in particular cases and for special reasons" where relief "can be granted without substantial detriment to the public good" and where the action "will not substantially impair the intent and purpose of the zone plan and zoning ordinance."[57] A series of recent cases have interpreted this statute, which to some appears an open invitation to seekers of special privilege.[58]

In *Monmouth Lumber Co. v. Ocean Township*,[59] the court held no proof of unnecessary hardship was required for a permit of this type. In *Schmidt v. Board of Adjustment*,[60] the court pointed out that the statute need not have standards to guide the board if the legislative body reserved final authority.

[54] See RALPH CROLLY, THE NECESSITY FOR ADEQUATE STANDARDS FOR BOARDS OF ZONING APPEALS IN SPECIAL EXCEPTION CASES (N. Y. REGIONAL PLAN ASS'N, 1949).

[55] 344 Ill. 82, 176 N.E. 333 (1931).

[56] 124 N.J.L. 135, 11 A.2d 304, *aff'd*, 125 N.J.L. 67, 15 A.2d 598 (1940).

[57] N. J. REV. STAT. §40:55-39d (Cum. Supp. 1953).

[58] For a brief critical analysis of the statute and decisions before 1952, see Stickel, *A Review of Powers and Functions of the Board of Adjustment in the Light of Recent Court Decisions*, New Jersey Municipalities, June, 1952, p. 7.

[59] 9 N.J. 64, 87 A.2d 9 (1952).

[60] 9 N.J. 405, 88 A.2d 607 (1952).

In *Ward v. Scott*,[61] the statute was assailed as an unconstitutional delegation of power to an administrative agency on the ground that since the standard of hardship did not govern there was no clear rule to guide the board. The court held that proper standards were provided by the statement of purposes of zoning in the statute's preamble and by the negative requirement that the proposed use must not substantially impair the intent and purpose of the ordinance. The dissenting opinion, however, should be noted:

> . . . unless the recommendatory relief procedure . . . be confined to cases of undue hardship inherent in the particular lot . . . or to permissible special uses prescribed by ordinance according to certain and definite standards of conduct . . . the measure is assailable as purporting to delegate power that is at once arbitrary and an invasion of the legislative domain.

Whatever may be the rule of law, the wisdom of this type of variance or exception procedure is questionable. It almost hopelessly confuses the differences between legislative and executive functions. It increases the time necessary for a final decision, and it is unnecessarily confusing to the citizen. Perhaps most undesirable of all, the granting of variances is removed from the jurisdiction of a specialized, non-partisan body and placed in the hands of a politically motivated, often uninformed, and frequently overworked council. A technique better calculated to destroy the beneficial effects of sound zoning could scarcely be devised.

V

CONTROL OF THE BOARD OF APPEALS

Although the past twenty years has seen some general agreement on the proper scope of board of appeals powers at the highest judicial levels, let no one think that all is well. Thousands of board decisions are made each month. A very high percentage of them would not survive review by even the most tolerant court. But it is only in flagrant cases of abuse of authority—and then only if the financial stakes are sufficiently large—that decisions are taken to *any* court. The large number of reversed decisions at the appellate level is proof enough also that many lower courts have only the vaguest understanding of or sympathy for the law in this field. And in some states the rulings of even the highest courts are difficult to understand.

Fortunately, there are some remedies. If no one or combination of these seems likely to transform the board of appeals into a model administrative tribunal, they should at least help to eliminate some of the features that have made our appeals boards the shame of our cities.

1. *Statutes and ordinances should specify clearly the separate powers of the board.* The Standard Act satisfies this suggestion, but in some states, like New York, the statutes hopelessly jumble the powers of the board so that a lay member has no

[61] 11 N.J. 117, 134, 93 A.2d 385, 393 (1952). See also Ward v. Scott, 16 N.J. 16, 105 A.2d 851 (1954).

clear understanding of the limits of authority.[62] Too many ordinances simply repeat or paraphrase the wording of the statute. Simple and unambiguous phraseology should at least serve to distinguish variances from exceptions and indicate generally the grounds on which they may be granted.

2. *Rules of procedure should be required.* If the drafting of rules of procedure were required, instead of being made optional, the board would be forced at least once to consider the procedure for hearing appeals, the nature of the evidence required, and the basis for reaching decisions. These rules should be given wide distribution, and such groups as the local bar association, a citizens' planning council, and neighborhood associations should be given an opportunity to examine and criticize them.

3. *The board should adopt administrative forms that focus attention on the proper requirements for variances and exceptions.* Forms on which appeals to the board are made should provide more than the usual spaces to record the name and address of the appellant, the variance or exception requested, and the reasons for the appeal. The applicant applying for a variance should be required to state why he is suffering a hardship, why he believes the hardship is unique, and why the variance would not alter the character of the neighborhood. Similarly, the form on which the board records its decision should require a statement of the findings under those same three headings. This single administrative device should reduce confusion, eliminate irrelevant lines of inquiry, and force both the applicant and the board to consider only the essential issues.[63]

4. *Maps showing the location of variances and exceptions should be mandatory.* The cumulative damage done to the municipal zoning plan is little understood by most boards, immersed as they are in the regular flood of applications to be considered each week or month. Maps indicating the location of every special permit would be a constant reminder of the effect of their actions and might exercise a restraining influence. Boards might also begin to understand that a concentration of variance symbols on the map in one area perhaps indicates conditions of general hardship, a situation which they have no power to relieve. And if separate symbols were used to show all permits issued with conditions attached, the board might begin to consider both the administrative difficulties and administrative costs which these actions have created.

5. *Jurisdiction over special exception uses requiring a showing of community need should be given to the planning board.* It is difficult to see why the board of appeals should be required to hear applications for these types of uses when it lacks the staff resources, the experience, and the understanding necessary for intelligent decisions. Discretionary authority for this type of exception should be given to the planning board.

[62] See, for example, N. Y. TOWN LAW Art. 16, §267 (1951).

[63] Hoover, *Local Governments Try New Zoning Forms,* American City, Nov. 1951, p. 124: BROOME COUNTY PLANNING BOARD, FORMS FOR ZONING ADMINISTRATION.

6. *Use variances should be prohibited.* Since under the rule of hardship, unique circumstances, and preservation of neighborhood character use variances can be justified only in extremely rare situations, it might be wise by statute to prohibit them altogether. This is a drastic measure but one not without precedent.[64]

7. *Legislative variances should be eliminated.* No useful purpose is served by legislative review of board decisions. For reasons previously stated, this type of procedure should be purged from the statutes.

8. *The lay board of appeals should be replaced by a board of experts or by a single zoning appeals administrator.* The concept of the board of appeals as a kind of poor man's court where common sense justice is dispensed by one's friends and neighbors no longer has much validity. With zoning ordinances increasing in complexity and detail and with the growing demands for more positive zoning as an aid to vigorous community planning and urban renewal, zoning appeals should be reviewed by those qualified through professional training or experience. There may be compelling arguments for retaining the board form in our zoning appeals organization, but we have had experience in other fields with appeals to a single administrator, and some examples also exist in zoning. The difficulties in the selection of an expert board or administrator should not prove insurmountable, and the potential benefits may well outweigh possible dangers. Our statutes should at least make possible the use of a single administrator as an alternative to the traditional board, and we should begin to reconsider the methods of selection of board members should we elect to retain the existing form of organization.

9. *The general standard of "unnecessary hardship" might be replaced by more specific rules.* Twenty years ago Alfred Bettman suggested that,[65]

> . . . experience ought sooner or later to disclose typical and recurrent situations for which more definite rules could be formulated to govern the board's necessary, though dangerous, power of allowing variances from the standards set forth in the zoning ordinance.

Surely by now we have had sufficient experience to prepare more specific rules and to describe in more detail the types of hardship situations over which the board should have jurisdiction. In effect this would mean abandoning the idea of variances entirely and increasing the scope of special exception jurisdiction by defining precisely the various types of hardship situations in which the board might grant relief.

VI

CONCLUSIONS

The discretionary powers of the board of appeals, while of considerable scope, are not limitless. The decisions of the past twenty years have been increasingly re-

[64] N.J. REV. STAT. §40:55-39c (1948), as amended in 1953.

[65] EDWARD M. BASSETT, FRANK B. WILLIAMS, ALFRED BETTMAN, AND ROBERT WHITTEN, MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES (HARVARD CITY PLANNING STUDIES, VII) 64-65 (1935).

strictive, and one might almost begin to hope that the hundreds of boards throughout the country, now so generous with their special favors, would begin to absorb the basic principles laid down at the highest judicial levels. The variance requirements for a showing of genuine hardship, unique circumstances, and compatibility with neighborhood character have become generally accepted by our courts. Requirements for valid special exceptions cannot be so precisely stated, and in this area of jurisdiction there are perhaps questionable tendencies for courts to sustain broad and ill-defined grants of legislative power. The problem of educating our boards of appeals to their responsibilities and limitations still remains. If this goal can be achieved, one of the obstructions to good zoning will have been removed.

REGULATING THE TIMING OF URBAN DEVELOPMENT

HENRY FAGIN*

Coordination, a major aspect of planning, involves *space* and *time*. Effective urban planning demands a simultaneous attention to both.

In the past half-century a static attempt at space coordination has become widespread. Its essence is expressed in certain dictionary definitions of the noun *plan:* "a representation drawn on a plane" or "a scheme of arrangement." The master plan, the comprehensive plan, the zoning plan frequently are interpreted as embodying an ideal and ultimate balance among districts of land classified as residential, commercial, and industrial. Since this conception deals with the *what* irrespective of the *when* it represents what I term static space coordination.

A dynamic approach to space coordination is suggested by other dictionary definitions of *plan:* "a schematic program indicating parts in their arrangement," "a method of action." Here we shift from dealing mainly with ultimate categories and patterns of land use to considering the activities involved in urban development. This latter approach stresses the coordination of programs of action. It relates industrial, business, service and residential construction activities; it coordinates the variety of activities that extend the urban transportation system; and it relates all these to the activities that utilize parcels of land.

The evolving demands on urban planning already have forced a shift in focus from the *map* to the program of action. The ultimate master plan map as the goal of planning is being replaced by a "planning process" conception in which the master plan is regarded as an open-ended sequence of plans describing at each successive point in time a desirable equilibrium among ever-changing activities. Any single map in the series represents a cross-section cut through the community at some critical instant in time—a concatenation little likely to be repeated at any other time. (One eminent city administrator now uses the term "forward programming" in place of "master planning.")

Necessarily, this conception of urban planning involves coordination in *time* as well as space, of programs as well as land areas. Capital budget programming is a start, but deals only with a small portion of a large problem. It is my belief that until the science of planning invents greatly improved methods for regulating the timing of urban development, many attempts at space coordination must con-

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tinue to fail—master plans remaining unrealized, zoning ordinances ineffectual and rapidly obsolescing. Static space coordination is not merely inferior, it is impossible in a dynamic world.

TIME COORDINATION

Coordination in time has two aspects. *Tempo,* the rate of urban development, is the first. The Borough of Mountain Lakes, New Jersey, which has acquired most of its remaining developable land and sells a limited number of building lots annually, is regulating the absolute tempo of its growth.

Moses Lake, a city in the state of Washington, makes the tempo conditional on certain future events. In the proposed Moses Lake "reclamation zone," certain lands may not be utilized for buildings until they have been filled in accordance with established grades. Already the city has refused to approve a subdivision plat for lands within one area subject to flooding.

The statutes of Washington empower a planning agency to disapprove a subdivision not in the *public interest.* According to Floyd M. Jennings, planning consultant to the Association of Washington Cities, this proviso "has not been adjudicated in the State of Washington, to the best of [his] knowledge. . . ." However, a number of cities have adopted subdivision ordinance provisions specifying that:

> Land, which the planning commission has found to be unsuitable for subdivision due to flooding, bad drainage, steep slopes, rock formations, or other features likely to be harmful to the safety, health, and general welfare of the future residents, and which the planning commission considers inappropriate for subdivision, shall not be subdivided unless adequate methods are formulated by the developer and approved by the city engineer.

Mr. Jennings writes that "None of these local experiences have been adjudicated by a Court of Record or by a lower court in this state."

Sequence is the second aspect of time coordination. It is exemplified in a zoning ordinance under active consideration in Clarkstown, New York. In this ordinance there will be an attempt to encourage growth around existing settlements before opening additional lands to intensive use.

To carry out this program, some areas, placed at first in one-acre residence districts, are designated on the new zoning map for change to the ⅓-acre district. Specific conditions must be found to exist before such changes will be made, but changes in these areas shall have priority over those in other areas. Thus, within the general reserve of two-acre and one-acre open land, certain districts will be available immediately for intensive development while other specifically designated and mapped areas will become available after the initial lands near full utilization. This will tend to bring about a planned sequence of land development at designed densities.

Existing measures affecting the timing of urban development appear to be motivated by a number of considerations—not all of them, to be sure, equally valid in social, economic or legal terms. For instance, acreage zoning and minimum-size

dwelling regulations when carried to excess; obsolete building code requirements retained mainly to maintain a high local cost of new construction and thereby to discourage new tax burdens; controls over dwelling appearance which hamper large-scale or prefabricated building operations—all these tend to slow the rate of growth, though they are intended primarily for other purposes.

FIVE PLANNING BASES FOR TIMING CONTROL

But there are at least five well-considered motivations for regulating the timing of urban development. These derive from the specific nature of modern community-building activities and community requirements:

1. *The need to economize on the costs of municipal facilities and services.* These costs are strongly affected by the sequence in which the different areas of a municipality are developed. This matter involves the efficient provision of police and fire protection, schools, bus lines, streets and highways, utilities, and other important facilities. The sequence of building operations determines, for example, whether linear facilities such as pipes and streets will have to be extended inefficiently over long distances to serve scattered users or will be extended gradually to serve areas built in careful phase with efficient facility growth.

The order in which the parts of a large community are built affects both the initial expense of facilities and their costs of maintenance and operation. Large-scale builders like the Levitts place great emphasis in their construction operations on careful scheduling for the most economical possible sequence of development, section by section. The proposed Clarkstown regulations discussed above are intended to reduce long-term municipal expenses.

2. *The need to retain municipal control over the eventual character of development.* For example, the desired over-all future town pattern may require intensive development served by public sewer and water lines in an extensive valley at present remote from any utility lines. If there is no control over the timing of building, however, the area in question may be the early subject of a substantial amount of low-intensity construction served by individual wells and separate sewage disposal fields. The existence of this type of development may later make it impossible to convert the valley to the more intensive character required by the evolving municipal pattern, even though important community-wide reasons exist for doing so. In similar fashion, an important future industrial area may become so cut-up by scattered small-scale factories as to preclude its eventual development as a planned, coordinated industrial district when the time is ripe.

3. *The need to maintain a desirable degree of balance among various uses of land.* For example, it is essential to the economic stability of certain municipalities which contain large areas of low-value homes that the service costs be offset by tax income from commercial and industrial ratables. In such places it is essential that new residential construction be timed in proper relation with business and industrial expansion.

Another sort of balance involves the subtle relationship of areas of varied character. The village of Hastings-on-Hudson in New York has a policy exercised through the zoning ordinance which regulates the timing of apartment construction in relation to the rate of one-family home building in accordance with a 15 to 85 ratio. Thus, for instance, whenever 85 new one-family dwellings have been built, the village may issue permits enabling 15 dwelling-units in apartment buildings. This regulation is intended to maintain what is locally felt to be a desirable predominance of one-family dwellings in a commuter village, but at the same time to make possible a necessary though smaller supply of rental apartments. The device makes the timing of one element conditional on the timing of another related element.

4. *The need to achieve greater detail and specificity in development regulation.* The growing awareness of this need is evidenced by the trends in zoning towards increased use of special permit devices subject to detailed requirements and conditions and by the popularity of "designed-district" provisions.

In Great Britain a desire for greater sensitivity of controls led to the present system of development permissions instituted after country-wide public acquisition of "development rights." Local authorities may grant or withhold permission to build, according to the needs of a development plan. At least in the negative sense—that is, being able to prevent development unless it accords with a municipally determined time schedule—the British regulations illustrate an application of control over timing to enable specific conformity with a detailed municipal plan. Under the British controls, for example, on a specific site in a developing area, permission for a store building may be denied on one day if the planning authority considers the construction premature, and at a later date permission may be granted.

There is, of course, a direct but generally unrecognized counterpart to this in the United States. Commonly, a municipality, petitioned to rezone a residential tract for a regional shopping center, refuses to do so when requested, but later decides the propitious moment has arrived and enacts the necessary amendment.

So long as zoning practice provided roomy districts, each with a capacity for more than the expected amount of pertinent development, the element of *time* was unimportant. With the current trend to specific changes for specific projects, however, timing has become an integral element in zoning administration. Occasionally, indeed, special zoning amendments and special use permits are so drawn as to become null and void after a specified period of time if construction has not commenced.

5. *The need to maintain a high quality of community services and facilities.* This requires during periods of rapid building expansion that adequate intervals of time be assured for the assimilation of residential, business or industrial additions to the community.

When newcomers are added faster than municipal facilities and services can be

increased, the resulting overloads on existing capacities cause a decline in the quality of services. Uncontrolled, this deterioration can result in seriously substandard levels of water supply, sewage and waste disposal, public school education, and public recreation. Moreover, if the rate of sudden and unanticipated shopping or industrial expansion outstrips the pace of highway improvement, residential streets may be flooded by excessive traffic seeking to by-pass congestion. (It is possible that adequate time for the *social* integration of incoming families represents a sixth legitimate basis for regulating community growth.)

Sands Point, New York, has adopted a means of partially regulating the rate of residential development to keep it in reasonable relationship with community facility and service capacities. In the Sands Point zoning ordinance, land subdivision is defined as a business use, permitted in residential districts only on special permit. The village planning board in connection with its review of each subdivision is required to make a finding as to the village's capacity to absorb the proposed new lots. If deemed appropriate, the subdivision approval may be accompanied by a limitation on the number of lots for which building permits will be issued in any one year. The planning board is empowered at its discretion to limit building to 20 per cent of the approved lots in each of the next ensuing five years.

TOWARD A MORE SOLID FRAMEWORK FOR REGULATING THE TIMING OF URBAN DEVELOPMENT

Motivated by the foregoing five planning bases for timing control, it is possible to design reasonable and workable regulations affecting both the sequence and the tempo of building operations. The following suggestion sketches one possible approach to such regulations.

A. Zones of Building Priority

Under the system of controls suggested here, the zoning map is derived from the series of land use maps that comprises the master plan sequence described above in the first section. It shows all lands in the specific use, density and bulk district designations determined appropriate by the local governing body. These designations embody the best current thinking as to the most desirable municipal pattern. Land for which a specific designation cannot yet reasonably be made is placed in a large-acreage "reserve district," from which portions are assigned to particular districts from time to time.

Superimposed on these basic districts, however, is an additional set of building sequence districts called *zones of building priority;* and these range from first priority to last priority through an appropriately numbered series. Building permit applications are granted in the order of the zones of building priority and within each such zone in the order of application dates.

The assignment of particular zones of building priority expresses the sequence of development most advantageous to the municipality for economizing on municipal

costs and for securing the desired character of development—bases (1) and (2) above.

B. Regulating the Tempo of Building

The availability of building permits under the suggested controls is determined separately for each broad zoning classification—close and open type residence, business, manufacturing, etc. The number of permits available from time to time is derived from: findings as to the current balance among different types of development—basis (3); findings as to the status of specific private and public projects proposed to be encouraged by the municipality in the public interest—basis (4); and findings as to the current capacity to assimilate the proposed structures in view of the progress of municipal programs for facilities and services—basis (5).

A municipality exercising this system for regulating the timing of urban development should be obliged by statute to carry forward programs of municipal facility and service expansion reasonably related to development trends so as not to block the utilization of land but to expedite it in orderly fashion. A developer of land should have the opportunity of improving the building priority rating of his land by offering to construct off-site facilities and to provide services needed for proper development, but not yet feasible of municipal programming.

Undoubtedly, the institution of systematic controls over the timing of development will affect the market value of various parcels of land—some upward, some downward—but this has always been true of measures taken under the police power. Possibly, in certain municipalities each parcel of land in separate ownership on the effective starting date of the regulations will be considered entitled to one building permit irrespective of priority zone; and perhaps in rural areas building permits will be granted irrespective of priority zone in all applications involving very large lots —five or ten acres or more per structure.

Viewing the municipality in its entirety, the advantages of wisely exercised time regulation for shaping and achieving superior urban patterns will afford a greatly increased property value for the total of all land. After a period of readjustment, new value levels will reflect the real utility of the land, and ad valorem taxes will distribute the burdens of municipal service costs accordingly.

In occasional specific circumstances some form of compensation possibly will be warranted to offset individual losses. This may follow the Mountain Lakes precedent of municipal purchase at fair present market value; with respect to vacant tracts it may entail differential tax rates as between the different zones of building priority; it may involve a municipal option to buy agricultural land after a stated period of continued farming use; or it may involve adapting the British method—municipal purchase of development rights.

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In general, however, the mass of mounting evidence eloquently argues that regulating the timing of urban development is a valid and necessary exercise of the

police power. Such regulation not only is permissible in the legal sense but has become an urgent responsibility of municipal government needed to protect the very health, safety, and welfare of our rapidly growing suburban communities. In the light of planning theory as expounded in this paper and of the accumulated experiments of municipalities throughout the nation, it is clear that tempo and sequence zoning administered pursuant to soundly based municipal planning policy and in accordance with reasonable regulations will be powerful aids toward improving the quality of our communities.

ELIMINATION OF INCOMPATIBLE USES AND STRUCTURES

C. McKim Norton*

Given a reasonably suitable and extensive piece of open country, it is possible today to design and build a model town with "a place for everything and everything in its place." Recent examples of such developments are the new industrial town of Kittimat, British Columbia[1] and the residential communities of Park Forest, Illinois[2] and Levittown, Pennsylvania.[3]

In such developments, incompatible uses are physically separated from each other. For the forseeable future at least, a conventional zoning ordinance and its honest administration will maintain the desirable *status quo* and protect the town plan against encroachment.

The typical American community, however, was largely built in the period between the early concern over town layout of our colonial forebears and the reawakening of city planning in the twentieth century. Today an admitted cause of residential and commercial slums, traffic congestion, and other indicia of urban obsolescence is the haphazard mixing of incompatible land uses. A large part of the city planning problem today, therefore, is not how to design and build the perfect urban machine but rather how to take out the misfit parts of the machine which we have inherited.

Analysis of Incompatibility

The problem of incompatibility of land uses and buildings was well stated by Justice Sutherland when he wrote in 1926 in the *Euclid* decision,[4]

> Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality . . . A nuisance may be merely a right thing in the wrong place,—like a pig

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[1] Stein and Others, *Industry Builds Kittimat—The First Complete New Town in North America,* Architectural Forum, July 1954, p. 128; *id.,* Aug. 1954, p. 121; *id.* Oct. 1954, p. 159.

[2] *New Satellite Town of 25,000 Planned,* The American City, Jan. 1947, p. 82; *New Satellite Town Financed,* The American City, July 1947, p. 147.

[3] Levitt, *A Community Builder Looks at Community Planning,* 17 J. Am. Inst. of Planners 80 (1951). While this article describes the planning of a community for Long Island which was never built, the principles, general plan, and basic house design were all incorporated in Levittown, Pa.

[4] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 389 (1926).

in the parlor instead of the barnyard. In some fields, the bad fades into the good by such invisible degrees that the two are not capable of being readily distinguished and separated in terms of legislation.

Since 1926 the city planning profession has been trying without as yet complete success to develop standards of compatibility and incompatibility which are objective, scientific, and, as a practical matter, enforceable.

In the earliest days of zoning it was thought that all uses could be classified very simply by a "hierarchy of uses" into three districts—residential, commercial, and manufacturing. Residential districts included nothing but "parlors" other than a few essential accessory uses such as churches, public schools, and suburban railroad depots. Everything allowed in residential districts was permitted in commercial districts. The manufacturing or pig-sty district was a catch-all for every kind of use including manufacturing, commerce, and housing (for people who could not afford to live elsewhere).

As a contrast to this primitive separation of uses and buildings, consider the proposed new zoning resolution for New York City.[5] Here in the nation's largest and most complicated city the planning consultants find the need for 15 zoning districts in which are permitted 18 different use groups (combinations of compatible uses). The use groups include 3 groups of *residential uses,* 2 groups of *community facilities* which are properly associated with some or all residential districts, 4 groups of *retail and commercial uses,* 3 groups of *wholesale and commercial amusement uses,* one group of *heavy commercial and automotive service uses,* and 6 groups of *manufacturing uses.*

One of the manufacturing use groups includes office, laboratory and manufacturing uses which, when subject to adequate controls over bulk and landscaping, are appropriate in certain locations in low density residential areas, if they comply with certain performance standards. In other words, it is even proposed to let a pig into the parlor provided it is a housebroken pig with a pleasing (preferably red brick colonial) face. The philosophy behind this attempt at classification according to standards of compatibility and incompatibility was most lucidly summarized by New York City Planning Commissioner Lawrence M. Orton when he stated,[6]

> As has frequently been said, it isn't so much *what you do* as *how you do it,* that counts. Houses and apartments, stores and even factories, can be mixed harmoniously and advantageously, provided the design is right.

From the standpoint of residential areas, incompatibility of uses and buildings has generally been measured by the following factors[7] (most of which are cited in the *Euclid* opinion to justify the separation of industry and high density apartments from a single family district):

[5] PLAN FOR REZONING THE CITY OF NEW YORK, A REPORT SUBMITTED TO THE CITY PLANNING COMMISSION BY HARRISON, BALLARD, AND ALLEN (Oct. 1950).

[6] 13 J. AM. INST. OF PLANNERS 3 (Summer-Fall 1947).

[7] See O'Harrow, *Performance Standards in Industrial Zoning,* in AMERICAN SOCIETY OF PLANNING OFFICIALS, ZONING—1951 42, for an excellent discussion of what planners often term "nuisance factors."

(1) *Danger to persons or property* (such as fire, explosion, hazard, corrosive fumes, and auto, truck, railroad, airplane traffic); (2) *danger to health, convenience, and comfort* (such as excessive smoke, dust, odor, noise (including traffic noise), vibration, glare at night, industrial waste, garbage, obstruction to light and air, and overcrowding of people on the land); (3) *danger to morals* (such as commercial gathering places for drinking, gambling, amusement); (4) *miscellaneous other factors* (such as aesthetic, psychological and physical deterioration of neighborhood desirability due to factors including appearance of grounds and buildings, commercial signs, uses with unpleasant associations, decline of neighborhood homogeneity, prevalence of strangers on business visits, encroachment of commercial-visitor parking on residential streets, increased vehicular street traffic induced by commercial and industrial establishments, and parental fear of physical and moral danger to children).

From the standpoint of commercial areas, incompatibility of uses and buildings may be measured by "economic incompatibility factors" such as land uses and buildings which interrupt pedestrian traffic flow in retail areas. "Such interruptions are created by (a) 'dead spots' where shoppers lose interest in going further, (b) driveways and other such physical breaks in the sidewalks, (c) cross traffic, either vehicular or pedestrian, and (d) areas characterized by hazards, noises, odors, unsightliness, or other unpleasant features."[8] The new shopping centers are setting sensible standards of order and appearance, lack of which in existing business centers includes such nuisance factors as too many commercial signs, heavy vehicular traffic unrelated to the shopping center, and overcongestion of buildings in relation to streets and parking facilities.

Similarly, industry today recognizes the new design standards of modern factories and planned industrial districts and, in general, that residences should be excluded from manufacturing districts on the principle, no doubt, that if people live in the pigsty long enough, they eventually will send the pigs elsewhere.[9]

EFFORTS TO ACHIEVE COMPATIBILITY

A. By Zoning

The basic principles of comprehensive zoning were developed before the automobile era, the great expansion of metropolitan cities, and the technological revolution, still going on, in ways of housing people, business, and industry. A first tenet of comprehensive zoning was and still is that it is possible to map an urban land area into districts in which a class or classes of compatible uses are permitted and uses incompatible with them are prohibited. The first zoners, however, liked their districts "straight" with few or no accessory or mixed uses or building types.

[8] CITY OF CHICAGO, CITY COUNCIL COMMITTEE ON BUILDINGS AND ZONING, PROPOSED COMPREHENSIVE AMENDMENT TO CHICAGO ZONING ORDINANCE, GENERAL REVIEW 30 (Jan. 1954).
"American zoning received its first great impulse from the utilitarian desire to protect Fifth Avenue, New York City, property values from the demoralization which was being caused by the inroads of manufacturing structures." Bettman, *Constitutionality in Zoning*, 37 HARV. L. REV. 834, 858 (1923).

[9] See NATIONAL INDUSTRIAL ZONING COMMITTEE, PRINCIPLES OF INDUSTRIAL ZONING (Aug. 1951).

Thus single family districts were considered as areas in which apartment houses were rigidly excluded.

Talented architects and new-town planners like Clarence Stein argued that row houses and apartments could quite properly be mixed with single family houses and demonstrated the fact in developments such as Radburn in unzoned Fairlawn, New Jersey.[10] They railed against the crudity of zoning classifications, but to little avail, since it was widely believed that the general improvement which zoning promised outweighed the admitted rigidities it imposed on design.

When zoning was first developed, its proponents hoped that existing incompatible uses and buildings (classified by the zoning ordinance as non-conforming) would gradually disappear. Thus zoning would act as a comb to straighten out the tangled kinks of past city development.

Zoning, one must remember, was a radical concept in 1916 even as regards regulating the future use of undeveloped land areas. "During the preparatory work for the zoning of Greater New York, fears were constantly expressed by property owners that existing nonconforming buildings would be ousted. The demand was general that this should not be done. The Zoning Commission went as far as it could to explain that existing nonconforming uses could continue, that zoning looked to the future, and that if orderliness could be brought about in the future the nonconforming buildings would to a considerable extent be changed by natural causes as time went on."[11]

Nonconforming buildings and uses, however, have shown great vitality in persisting because of the simple fact that most nonconforming uses (such as a store or a filling station in a residential district) have the high earning capacity of a well-situated monopoly created and protected by law.

Although most zoning ordinances permit, and a few state enabling acts[12] require, that nonconforming buildings and uses continue when an ordinance goes into effect, their alteration or enlargement is generally prohibited, and their reconstruction after abandonment, discontinuance or destruction by fire, hurricane, explosion or other act of God is denied.[13]

Furthermore, there is an accelerating trend towards the positive elimination of nonconforming uses without compensation under zoning regulations[14] which require discontinuance after a reasonable period of time in which the nonconforming value of a building or use is deemed to be amortized.

[10] "The Borough of Fairlawn, then mainly a rural community, had not yet been sold an official road plan or a zoning ordinance. For this we offered thanks; we were free to design a functional town plan." CLARENCE S. STEIN, TOWARD NEW TOWNS FOR AMERICA 39 (1951).

[11] EDWARD M. BASSETT, ZONING 113 (2d ed. 1940).

[12] *E.g.*, MASS. ANN. LAWS c. 40, §26 (1952); N. J. STAT. ANN. tit. 40, §55-48 (1940); both cited in Note, 102 U. OF PA. L. REV. 91, 92 (1953).

[13] See Note, *Elimination of Nonconforming Uses*, 35 VA. L. REV. 348 (1949), which contains an excellent discussion of the usual restrictions not generally classified as "retroactive."

[14] This trend has been strengthened by the favorable decision obtained by the City of Tallahassee in eliminating service stations on a ten year amortization basis. See Standard Oil Co. v. Tallahassee, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950).

Thus, for example, the city of Los Angeles requires[15] that nonconforming buildings or structures in residence zones shall be completely removed or made conforming when they reach specified ages from the date of their erection (ranging from 20 to 40 years, depending on their building code class of construction). Nonconforming commercial or industrial use of a residential building or residential accessory building is to be discontinued within five years, where no buildings are employed in connection with such use, where the only buildings employed are accessory or incidental to such use, or where such use is maintained in connection with a conforming building. A nonconforming use of land which is accessory to the nonconforming use of a nonconforming building must be discontinued at the same time as the nonconforming use of the building is discontinued. Nonconforming signs and billboards are to be removed within five years. All nonconforming oil wells, including any incidental storage tanks and drilling and production equipment, must be removed within 20 years.

The Los Angeles ordinance has gained added interest because of a current court test. A wholesale plumber contested the validity of the provision. He resided on the property and had also been using his house and garage for office and storage purposes and the adjoining lot for storage in racks and bins.

The California District Court of Appeals, in its opinion, summed up the issues involved in compulsory amortization by zoning about as successfully as they have ever been stated:[16]

> Exercise of the police power frequently impairs rights in property because the exercise of those rights is detrimental to the public interest. Every zoning ordinance effects some impairment of vested rights either by restricting prospective uses or by prohibiting the continuation of existing uses, because it affects property already owned by individuals at the time of its enactment. . . . In essence there is no distinction between requiring the discontinuance of a nonconforming use within a reasonable period and provisions which deny the right to add to or extend buildings devoted to an existing nonconforming use, which deny the right to resume a nonconforming use after a period of nonuse, which deny the right to extend or enlarge an existing nonconforming use, which deny the right to substitute new buildings for those devoted to an existing nonconforming use—all of which have been held to be valid exercises of the police power. . . .
>
> The distinction between an ordinance restricting future uses and one requiring the termination of present uses within a reasonable period of time is merely one of degree, and constitutionality depends on the relative importance to be given to the public gain and to the private loss. Zoning as it affects every piece of property is to some extent retroactive in that it applies to property already owned at the time of the effective date of the ordinance. The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements. As a method of eliminating existing nonconforming uses it allows the owner of the nonconforming use, by affording an opportunity to make new

[15] CITY OF LOS ANGELES, COMPREHENSIVE ZONING PLAN, ORDINANCE NO. 90,500, as amended.
[16] City of Los Angeles v. Gage, 127 Cal. App.2d 558, 559, 274 P.2d 34, 43-44 (1954).

plans, at least partially to offset any loss he might suffer. The loss he suffers, if any is spread out over a period of years, and he enjoys a monopolistic position by virtue of the zoning ordinance as long as he remains. If the amortization period is reasonable the loss to the owner may be small when compared with the benefit to the public. Nonconforming uses will eventually be eliminated. A legislative body may well conclude that the beneficial effect on the community of the eventual elimination of all nonconforming uses by a reasonable amortization plan more than offsets individual losses.

Other cities which have outlawed nonconforming uses include New Orleans, which began in 1927 with a one year discontinuance for all commercial and industrial uses in residential areas,[17] changed to a 20-year period in 1929, and abandoned the principle in 1948;[18] Boston, Massachusetts, which requires elimination of all nonconforming buildings and premises after April 1, 1961 or 37 years after such buildings and premises first became nonconforming due to zoning action; Fort Worth, Texas, which requires certain nonconforming uses of land to be discontinued and all material completely removed by its owner within 3 years, and nonconforming commercial signs and billboards also to be removed within 3 years; Wichita, Kansas, which requires nonconforming commercial or industrial buildings located within specified dwelling districts to be either removed or converted to a conforming use on or before January 1, 1997 or within 60 years as to such buildings for which a permit was issued after January 1, 1937; Seattle, Washington, which requires in two residence districts any nonconforming use of premises which is not in a building to be discontinued within a period of one year; Chicago, Illinois, which requires discontinuance of nonconforming uses upon transfer of ownership or termination of the existing lease unless the nonconforming use is carried on in a building designed for the purpose, and in this latter event discontinuance is required upon expiration of the normal useful life of such building (which is fixed at 100 years for buildings of solid brick, stone or reinforced concrete with structural members of steel; 75 years for buildings of solid brick, stone or reinforced concrete with structural members of metal, reinforced concrete, masonry, timber or a combination thereof; and 50 years for buildings of all other construction); Tallahassee, Florida, which requires discontinuance of certain commercial uses in residential districts after 10 years;[19] Richmond, Virginia, which requires discontinuance of nonconforming uses of land only within one year and discontinuance of nonconforming buildings in residence districts at different times, such as 3 years for boarding houses and 20 years for commercial and industrial buildings which were at least 20 years old at the time of the ordinance, or, if not 20 years old, then 40 years from the date of the issuance of the building permit.[20] Other cities with amortization provisions in their zoning ordinances in-

[17] State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied*, 280 U.S. 556 (1929). See also State *ex rel.* Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929).

[18] See [1951] WIS. L. REV. 685, 692 n. 31.

[19] Sustained in Standard Oil Co. v. Tallahassee, *supra* note 14.

[20] See Note, 35 VA. L. REV. 348, 356 (1949).

clude Cleveland, Ohio, St. Petersburg, Florida, Kansas City, Kansas, Richmond Heights, Missouri, Corpus Christi, Texas,[21] and Akron, Ohio.[22]

Compulsory amortization of nonconforming uses, as an exercise of the police power under zoning, seems to be a reasonable and useful method of eliminating three categories of incompatibility—namely, (1) most uses involving no structures or structures of an impermanent nature, (2) nonconforming structures of an impermanent nature or representing a relatively small investment, and (3) nonconforming uses in conforming structures. These include such developments in residential districts as (1) commercial storage on open lots (junk yards, lumber yards, etc.), (2) filling stations, sheds for commercial use, and billboards, and (3) residential buildings used for commercial purposes.

In short, nonconformities which may be reasonably eliminated by up to ten years' amortization are properly disposed of by this method, especially when their incompatibility is so inherent in their operation that no reasonably enforceable performance standards could be devised to make them compatible. In many situations, for example, the commercial traffic essential to the nonconforming use makes its presence in a residential neighborhood a permanently deteriorating influence.

When the nonconforming structure represents such a large investment that more than ten years is required to eliminate it, the amortization method seems inadequate. To wait a generation or two before eliminating or even lessening the effect of an incompatible use is futile as a means of preventing the spread of the infection of incompatibility, unless the incompatibility is more imaginary than real.

B. By Abatement of Nuisance

Where an incompatible use or structure representing a major investment is a genuine menace to the area in which it is situated, it may be ordered discontinued or removed as a nuisance. Long before zoning, the courts sustained municipal regulations which required the immediate elimination of uses and buildings which, while short of a common law nuisance, had definite, tangible, physical effects which menaced public health, safety, and welfare.

Thus a Los Angeles regulation requiring the discontinuance at once of the manufacture of bricks in a section of Los Angeles which was developing as a residential area was sustained by the Supreme Court of the United States in a leading case.[23] In its opinion the Court said,

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any

[21] See City of Corpus Christi v. Allen, 254 S.W.2d 759 (Tex. 1953), in which the application of the ordinance to a particular automobile wrecking yard in a light industrial district was held improper.

[22] See City of Akron v. Chapman, 160 Ohio St. 382, 116 N.E.2d 697 (1953), in which the court held that an ordinance providing that any nonconforming use was to be discontinued whenever the city council determined that a "reasonable" time had elapsed was arbitrarily invoked in an attempt to outlaw a 29 year old junk yard in one year.

[23] Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community.

The same Los Angeles ordinance had previously been sustained by the state supreme court as applied to eliminate 110 Chinese laundries[24] and a lumber yard.[25] Subsequently, an ordinance prohibiting livery stables in residential areas was sustained by the Supreme Court of the United States,[26] as have ordinances against other uses—for example, smoke nuisance and oil tanks.[27]

The nuisance doctrine as applied to elimination of incompatible uses has had much less attention paid to it in recent years than it deserves. It generally has been felt that the use to be enjoined must be of a very tangible, crude and physical nature —a use so obviously detrimental to public health, safety, and welfare as to be a nuisance by common law reasoning, if not a common law nuisance (such as storage of gunpowder in a residential district). Perhaps this is because the early proponents of zoning, eager to make it palatable to land owners and investors, disassociated the harsh doctrine of nuisance from the broad regulation of future developments based on a community plan.

The courts are ready, however, to sustain regulations requiring discontinuance of practices which are demonstrated to be harmful to the public. In the often-cited case of *Jones v. Los Angeles*[28] where the court refused to sustain a law which prohibited all sanatoria for nervous diseases outside of specified districts and would have required discontinuance of four such sanatoria, the court made it clear that it could not find an "undoubted menace to public health, safety or morals." Similarly, in a case quite similar to the *Hadacheck* case,[29] the court refused to sustain an ordinance requiring the cessation of gravel pit operations because it found the discomfort "more imaginary than real."[30]

What makes an activity an abatable nuisance depends upon the facts of the situation. As our understanding of nuisance factors in urban development increases through medical, sociological and economic research, and as the city planners develop performance standards against which such factors can be measured, the nuisance doctrine will take hold in some situations where amortization under zoning would be ineffective. The cumulation of nuisance factors may at least justify the shortening of the period of grace given nonconforming uses. The zoning ordinance of Seattle,

[24] *Ex parte* Quong Wo, 161 Cal. 220, 118 Pac. 714 (1911).

[25] *Ex parte* Montgomery, 163 Cal. 457, 125 Pac. 1070 (1912).

[26] Reinman v. City of Little Rock, 237 U.S. 171 (1915).

[27] See Noel, *Retroactive Zoning and Nuisances*, 41 COL. L. REV. 457 (1941); Willis, *The Elimination of Nonconforming Uses*, [1951] WIS. L. REV. 685. A Bulletin of the Highway Research Board of the National Academy of Sciences on elimination of highway nuisances by court injunction is now under preparation by J. H. Beuscher of the University of Wisconsin Law School.

[28] 211 Cal. 304, 295 Pac. 14 (1930).

[29] See note 23 *supra*.

[30] Village of Terrace Park v. Errett, 12 F.2d 240, 243 (6th Cir. 1926).

Washington,[31] for example, requires certain nuisance-type industries (cement manufacturing, glue manufacturing, slaughter houses, etc.) in other than an industrial district to be discontinued within six months.

The county of Los Angeles has devised what appears to be a significant combination of the amortization and nuisance doctrines. By an ordinance adopted in 1950, existing nonconforming uses are granted an "automatic exception" to continue. Such exception remains in force for specified times, except that it may be revoked by the Regional Planning Commission if the Commission finds:[32]

(a) That the condition of the improvements, if any, on the property are such that to require the property to be used only for those uses permitted in the zone where it is located would not impair the constitutional rights of any person.

(b) That the nature of the improvements are such that they can be altered so as to be used in conformity with the uses permitted in the zone in which such property is located without impairing the constitutional rights of any person.

The basis for such findings includes the grounds that the use is exercised so as to be detrimental to the public health or safety or as to be a nuisance.

C. By Special Permit

Throughout the history of zoning there has been a quest for some formula which would enable law makers to establish a complete series of fixed regulations to guide logical urban development by rules of law. No such formula has ever been found.

The variance procedure, conceived originally as zoning's "safety value" to relax pressures arising from minor situations involving "practical difficulty and unnecessary hardship," has been much used and abused (thereby often adding new incompatible uses more rapidly than nonconforming uses were eliminated). Spot zoning, illegal but usually untested, has given the veneer of conformity to incompatible uses. Other devices such as the "legislative permit"[33] and New Jersey's "variance recommendation" procedure[34] have added another slow leak to the watertight concepts of the zoning pioneers.

To make zoning more flexible and still maintain a rule of law, the special permit exception or "conditional use" based on an administrative finding that specific standards have been complied with has come into common use. By this method new, otherwise nonconforming uses are permitted to be introduced into any districts where they are deemed to be compatible under suitable standards—for example, private schools, nursing homes or garages in residential areas. A recent development

[31] CITY OF SEATTLE, ORDINANCE No. 45382 (1923).

[32] Description of this ordinance is taken from excerpts reported in Livingston Rock and Gravel Co. v. Los Angeles County, 260 P.2d 811, 815 (Cal. Dist. Ct. App. 1953), in which the lower court declared the ordinance unconstitutional, a decision subsequently reversed by the California Supreme Court, in 43 Cal.2d 121, 272 P.2d 4 (1954). In this latter decision the immediate compulsory removal of an $18,000 cement batching plant from a light manufacturing district was sustained.

[33] See *Spot Permits—Spot Zoning by Legislative Special Permit*, 71 REGIONAL PLAN ZONING BULL. (1954).

[34] N. J. REV. STAT. tit. 40, §50-39(d).

in this area of zoning is the concept of the "designed shopping district" which may be fitted into residential areas.[35]

The fixed guideposts of urban development are tending to be only the major divisions of areas as predominantly residential, commercial or industrial, while the details of community development are increasingly being based on a bundle of performance standards by which compatibility and incompatibility are measured by an administrative agency.

If a new, otherwise nonconforming use can be admitted into a district by special permit, why cannot an existing nonconforming use be permitted to remain, if it can be improved so as to qualify under performance standards?

Thus it has been suggested[36] that a "well located" nonconforming local grocery store in a residence district be allowed to continue indefinitely if its owner brings it up to standards which were similar to those which a community planner might include in the design of a new residential community.

The practical trouble with this procedure today is that it is built upon the shifting sands of the performance standards concept carried to its logical conclusion.

The practical difficulties are obvious. In the first place, performance standards have not as yet been developed to the point where they can be applied objectively to such a situation by an administrative agency or a municipal governing body. Secondly, the Achilles' heel of performance standards is the constant and almost superhuman enforcement problem connected with so many of them. In the third place, the history of the administration of zoning by boards of appeal and municipal governing bodies leads one to the conclusion that the licensing of nonconforming uses would result in a breakdown of zoning in the present state of our objective knowledge of city development and our ability to administer land development regulations.

The logic of licensing nonconforming uses, however, is compelling. Certainly those uses which are today allowed only by special permit could also be permitted to continue under special permit even though nonconforming.

D. Eminent Domain

There seems little doubt that elimination of incompatible uses is a sufficient public purpose to justify a public taking with just compensation. Zoning by eminent domain, though impractical, was held constitutional in the states in which it was tried.[37] Condemnation of incompatible uses and buildings as a part of a scheme of urban redevelopment now rests upon the firm ground of the recent decision of the Supreme Court of the United States[38] in which the taking of a department store in

[35] See ZONING ORDINANCE TOWN OF CORTLANDT, N. Y. (1951), and ZONING ORDINANCE CITY OF NIAGARA FALLS, N. Y. (1951).

[36] Horack, *Planning for Better Zoning Laws* (address at 1954 National Planning Conference), to be published in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING—1954.

[37] Young, *City Planning and Restrictions on the Use of Property*, 9 MINN. L. REV. 593 (1925). See also [1951] WIS. L. REV. 685, 695 (1951).

[38] Berman v. Parker, 348 U.S. 26 (1954).

an area to be redeveloped for residential use was sustained. In this case the property condemned was not itself substandard and under the redevelopment plan it might be sold to other private interests.

Eminent domain is a last resort for the elimination of incompatible uses but one which may be increasingly used in urban redevelopment programs and in "stop-blight" situations where the incompatibility of relatively large investments is built-in and permanent and where amortization would take too long.[39] Public opposition to the costs of eminent domain and owner resistance to condemnation will require a clear-cut case to be made for the necessity of removing an incompatible building or use and the public benefits which will flow therefrom. In areas which are not yet substandard but only declining, this will require a more precise knowledge of cause and effect of urban blight than we now have.

CONCLUSIONS

From this discussion we may conclude that many incompatible uses may be ordered to be discontinued without compensation.

The term "retroactive zoning" as applied to the elimination of nonconforming uses should be abandoned. All zoning is basically retroactive in nature.

The elimination of incompatible uses of land and buildings can become as normal a part of administration of municipal government as street improvements or urban redevelopment.

Incompatibilities should be classified for administrative purposes into four categories: (1) nonconforming buildings; (2) nonconforming use of buildings; (3) nonconforming use of land; and (4) nonconforming lots.

Every zoning ordinance should prevent the alteration, enlargement, reconstruction after abandonment, discontinuance or destruction of any nonconforming building unless the structure is made conforming or is temporarily continued under the special permit discussed below.

Every municipality should analyze and classify all incompatible and nonconforming uses of land and buildings. Some categories may be dismissed as of insufficient importance or of such a widespread nature as to be ineligible for a program of compulsory conformity. The doctrine of *de minimis,* for example, may rule out minor lot and building measurement nonconformities. While lots nonconforming as to size may be required to be combined with adjoining vacant lots in the same ownership, in general, nonconformities due to up-grading of zoning standards may have to be tolerated until areas are reclaimed by redevelopment from the deadly subdivision and building practices of a generation or more ago.

Analysis of nonconforming uses may lead to their legalization by proper rezoning. In one city in New Jersey, for example, by variance and spot zoning enough heavy commercial automotive uses and buildings were permitted and built since 1946 in a

[39] MICH. STAT. ANN. c. 54, §5.2933(1) (1949) authorizes cities and villages to acquire "by purchase, condemnation or otherwise private property for the removal of non-conforming uses and structures" (see Note, 102 U. OF PA. L. REV. 91, 93 n. 19 (1953).

business district so as to change the predominant nature of a whole area. This area is now about to be rezoned for repair garages and similar heavy commercial uses.

In other parts of municipalities, analysis of incompatible and nonconforming uses may lead to the obvious conclusion that nothing short of condemnation or purchase of an entire area under a redevelopment plan will suffice to eliminate the built-in chaos. This is typical of the worst residential, commercial and industrial slum areas of the nation's older cities.

After analysis of incompatible and nonconforming uses, a program of action for large parts of the municipalities can be formulated. All uses of buildings and land which are determined to be of such a nature as to be subject to elimination can be placed under a permit of continuance. Such permits will allow certain structures and uses to continue only for a specified period of months or years. In some classes of uses, performance standards could be required to minimize nuisance factors.

The methods available for the elimination program include: (1) amortization by zoning; (2) injunction as a nuisance; (3) eminent domain; and (4) license by special permit or as a conditional use. Amortization and license could be combined in some categories of uses.

Administration of a general elimination program could properly include a program of municipal acquisition of undeveloped land suitable for certain classes of high nuisance-factor uses. This land could be made available to such uses, if they were ordered to discontinue elsewhere. Indeed, without offering nuisance industries a place to go, some municipalities would be open to the charge of "dumping,"[40] a charge no longer academic since the *Cresskill*[41] and *Dumont*[42] decisions.

Finally, the program of elimination of incompatible and nonconforming uses should take advantage of every type of regulation available to the municipality in addition to zoning. Public health ordinances, police regulations (including traffic regulations), housing laws,[43] and provision of municipal services can all play a part in bringing order into today's chaotic urban scene.

[40] See EDWARD M. BASSETT, ZONING 79-81 (2d ed. 1940).

[41] Duffcon Concrete Products v. Borough of Cresskill, 137 N.J.L. 81, 58 A.2d 104 (1948), *reversed*, 1 N.J. 509, 64 A.2d 347 (1949).

[42] Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182 (1953), *aff'd*, 15 N.J. 238, 104 A.2d 441 (1954).

[43] A bill has been introduced in the New York City Council with the following major objectives: (1) to halt the perpetuation of "old-law" tenements built before 1901 by requiring that alterations to these tenements must not add to sub-standard housing; (2) compulsory improvement of standards of existing old-law tenements in stages, or steps, over the next few years; (3) rigid control over tenements to facilitate enforcement of the law. This bill, if enacted into law, would affect an estimated 260,000 dwelling units in buildings over 50 years old in the Borough of Manhattan, representing more than one third of all apartments in Manhattan.

PLANNING LAW AND DEMOCRATIC LIVING

NORMAN WILLIAMS, JR.*

I

THE LEGAL AND SOCIAL FRAMEWORK OF PLANNING

A. The Scope of Planning

This symposium explores various problems arising out of the integration of planning with that system of social control known as law, with special emphasis on problems of constitutional law. As used here, "planning" means the process of consciously exercising rational control over the development of the physical environment, and of certain aspects of the social environment, in the light of a common scheme of values, goals, and assumptions. Planning is concerned with guiding both public and private action, and may be on a local, metropolitan, or regional basis.

In planning, primary emphasis is on the physical environment; yet the social environment is also involved in many ways. First, intelligent correlation of decisions on the development of the physical environment necessarily involves having consistent assumptions and policies derived from the social environment, as for example on the size and characteristics of the population, even though such matters are left generally to individual decisions. Second, in some instances attempts are made to influence individual decisions on such matters, as for example population migration and the birth rate—although here there is a wide difference of opinion on how far planning should go.[1] Finally, the distinction between the physical and the social environment is really an artificial and untenable one anyway, since the arrangement of the physical environment has a decided impact upon social conditions, and vice versa.

This process of conscious and purposeful control over the development of the physical and social environment in a relatively free society is something rather new in history. Moreover, in such a society the development of techniques to forecast probable future trends, and thus to ascertain and evaluate the range of possibilities within which control may be exercised, is a difficult process at best. The development of effective methods of exercising such control is even more difficult. Any consideration of planning techniques must therefore start with a realization that planning for the future environment is still in the experimental stage, and that the techniques available, while extremely useful, are still rather crude. It is a truism to

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[1] The one point on which there is universal agreement is that the precise outer limits of urban and regional planning are not easy to define. However, we are not concerned here with over-all economic planning in the socialist or collectivist sense.

say that even the best plans must be subject to constant review in the light of changing conditions. Moreover, what techniques are available have generally not been thought out in terms of all their implications for the whole environment. There is therefore no reason to be surprised if this symposium raises more questions than it answers.

B. Planning and Constitutional Law

The main premises of American constitutional law represent a codification and institutionalization of the primary values of a democratic society—equality of opportunity and equality of treatment, freedom of thought and considerable freedom of action, and fairness. Under the American system, a more or less independent mechanism of judicial review is established to provide an independent check on whether specific governmental decisions conform to these standards. While controversy has often raged about judicial action in other areas, it has always been recognized that it is an essential part of the judicial function to watch over the parochial and exclusionist attitudes and policies of local governments, and to see to it that these do not run counter to national policy and the general welfare.

Constitutional law should serve to shed light upon thinking about local planning, by requiring those concerned to do what they should be doing anyway—to work out the relationship between planning the future environment and the great issues connected with human freedom and opportunity. However, instead of fulfilling this high mission, the role of constitutional law in the field of planning has generally been in part to obstruct effective action, and perhaps even more to stultify thinking on these problems by confusing them with meaningless abstraction and legal fiction.

In order to get planning decisions and regulations upheld by the courts, which are usually unknowledgeable about the problems involved and often tend to be hostile, primary emphasis in planning litigation has, naturally enough, usually been placed on whatever arguments seem likely to make the particular regulations involved easiest to uphold. Thus, in zoning cases, no matter what the real problems are, it is generally argued that the regulations under attack were really concerned with considerations of public health and safety.[2] Moreover, it is customary also to invoke "the general welfare," in a way which seems to assume that this is something definite and meaningful, and also something quite different from health and safety. It is rare that the particular problems affecting health, safety, or other aspects of welfare are spelled out, analyzed, and evaluated. There is then no reason to be surprised that the resulting court opinions tend to proceed on a remarkably low intellectual level.[3] While the leading constitutional thinkers have been largely

[2] Perhaps the classic example is the argument that restrictions on billboards, far from being an aesthetic matter, are really concerned with protecting public safety and morals—because, after all, billboards might blow over and land on somebody, and because all sorts of nasty things might go on behind them. See Cusack Co. v. City of Chicago, 267 Ill. 344, 108 N.E. 340 (1915), *aff'd*, 242 U.S. 526 (1917). Legal fiction can hardly hope to progress beyond this.

[3] It should be remembered that zoning cases, which make up by far the largest part of planning

ignoring this whole area of law, small-time constitutional lawyers have thus been making their own distinctive (and rather substantial) contribution to the general muddle which surrounds thinking about planning matters.

Yet in planning for the whole future environment, many decisions may involve great and often difficult constitutional problems. For those issues and values which are fundamental in deciding what sort of a future environment is desirable, are often the very same issues and values which are most relevant in applying the great constitutional guarantees of fairness, equality, and liberty of action. There are infinite examples; a few will illustrate the point. If we are really serious in our desire for maximum freedom of individual action and equal opportunity for everyone, what implications does this have for planning future schools and the future supply of housing? In a society characterized both by genuine democratic trends and by wide areas of discrimination, prejudice, and snobbery, what is the meaning of equal treatment in providing facilities for people in such obviously unequal circumstances?[4] Or, if a policy of eliminating (or discouraging) non-conforming uses is applied vigorously in new residential areas, but cannot "practically" be enforced in slum residential areas which are full of mixed uses, how can this be squared with the concept of equal protection of rich and poor from noise, air pollution, and traffic dangers? Or, to put the matter broadly, what is involved in creating an environment suitable for democratic living?

An intelligent application of constitutional law to the measures used in planning the environment will therefore force a searching inquiry into basic problems—and thus become in fact an excellent vehicle for getting at what is really involved in planning decisions. If such searching inquiries are to be undertaken, this means that no major problem in planning law can really be understood except by an analysis thereof in relation to the whole background of the changing physical, economic and social environment. In short, what is needed in planning law is a super-Brandeis-brief approach.

C. Planning and Conflicting Social Forces

The way cities develop, it is not the case that a thorough planning analysis will always reveal a single solution which will best satisfy the needs of everyone involved. In fact, one is sometimes tempted to say that such situations are rare. In many, if not most, instances, there are likely to be opposing forces at work. These opposing forces may involve quite different desires or implications for the future environment; or the problem may be one of distributing insufficient public services to the areas of greatest need. It is remarkable how often, in a highly technical planning dis-

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litigation, are usually handled by small-time lawyers for a small-time fee, and therefore in a hurry. Many opinions read as if (as was probably the case) the lawyers considered their job done when they had found the leading zoning case in their own jurisdiction, and then copied out long passages of vague language about property rights, due process, the police power, and public health, safety and general welfare—which then end up as the first few pages of the court's opinion.

[4] See Judge Edgerton, dissenting in Hurd v. Hodge, 162 F.2d 233, 235 (D.C. Cir. 1947), *reversed*, 334 U.S. 24 (1948), as quoted on p. 337 *infra*.

cussion, differing uses of various planning devices can be most realistically viewed as rather sophisticated expressions of different social forces—between which a balance must be struck, or a decision made. The fact that these conflicting social forces may not be immediately apparent in connection with planning decisions, or that only one side may be vocal or vociferous, does not mean that the conflicts are not there. Nothing is more important than to be clear-headed about this. When one of these situations arises, normally there is no such thing as avoiding the issue, or making a decision on the "technical" and "non-controversial" problems only, or finding a safe and dignified refuge in accumulating endless piles of unassimilated information and hoping that somehow it will speak for itself. In brief, in these situations there is no such thing as neutrality. There is, however, plenty of opportunity for being so muddle-headed as not to realize what is going on, and what issues are actually being decided.

Again, plenty of examples are available; a few will suffice. Take the question of locating a hospital in a low-density residential area. Nearby residents will frequently object, because of the probability of increased vehicular traffic, more cars parked in the streets, disturbance of a quiet environment, etc.; and so zoning regulations frequently exclude hospitals from such areas. On the other hand, a relatively quiet residential environment, preferably with a bit of greenery, is recognized as an integral part of modern medical care; and so, if all future hospitals are forced into more crowded and less desirable environments, the sick are likely to suffer.[5] Or, similarly, a number of forces and devices are often at work to exclude various minority groups—frequently rapidly growing minorities—from living in certain areas; and all sorts of arguments are adduced in support of such a policy. Such exclusion, if widespread and effective, automatically becomes a major factor in preventing a sufficient supply of decent housing for such minorities—resulting directly and increasingly in overcrowding, and also contributing indirectly to various forms of social disorganization—which is then blamed on almost everything except the policy of exclusion. Or, again, school districts near the boundary between a white and a non-white residential area may be arranged so as largely to segregate the races into different schools, frequently with the result that the white schools will be underutilized and the Negro schools overcrowded. If another school is built in the Negro area to relieve the overcrowded school there, this may involve an implicit acceptance of the permanence of the segregated pattern; if one is not built, it is the Negro pupils who are likely to continue to suffer. This last is one of many situations where there is not only no possible neutrality, but no solution which is morally tolerable from a democratic standpoint.

To state the problem more generally, there is perhaps an innate conflict in the whole business of local and regional planning. Inevitably, the logic of any pro-

[5] Now that population growth is occurring largely in the lower-density suburban areas, this problem may become more serious. The best solution is to permit hospitals in such areas, subject to severe restrictions for required open space around buildings, required off street parking spaces, and screening.

cedure which seeks to analyze all needs impartially, and to provide for these in order of priority, has a built-in democratic bias. Yet, particularly since planning is so largely administered locally, there is no question that planning techniques (and technicians) have often been utilized for local and exclusionist purposes—even though in effect this obstructs planning for the larger areas.

Since many of the problems reviewed below will involve just such conflicting social trends, the premises assumed herein had better be explicitly stated. While the reality of other social attitudes is recognized, this article will proceed upon the same assumptions as does the Constitution, and in fact so much of American history and experience—"The American Creed," *i.e.*, the belief in equal opportunity and equal treatment.[6] Moreover, it will be assumed that, to the extent that frictions arise from cultural differences, appropriate conditions are present so that either (a) assimilation will eliminate or reduce those differences, or (b) education will result in acceptance of such differences. This article will be concerned primarily with those problems of planning law which are of the greatest significance in democratic development.

II

THE SIGNIFICANCE OF A CHANGING ENVIRONMENT

A. The Influence of the Environment on the Possibilities for Democratic Living

Among the more significant conflicts relating to the environment are those conflicts which revolve around the creation of an environment favorable or unfavorable to the creation of democratic patterns of living. Moreover, it appears likely that the arrangement of the environment is one of the major factors in the development of democratic living patterns.

While not much scientific evidence exists about the effect of the environment on living patterns, a few recent pioneering studies are certainly suggestive. A successful democratic system presupposes wide areas of mutual friendship and/or respect; and a basic question is—what are the conditions under which such relationships are likely to arise? Apparently the arrangement of the environment has considerable significance in this respect. For example, in a study of a medium-size North-Eastern city, most marriages were found to have occurred between parties living relatively near each other: about 75 per cent came from people living within 20 blocks of each other, and 35 per cent actually came from within 5 blocks.[7] An analysis of how friendships arose in two adjoining temporary veterans' housing projects under university auspices (one row-house and one apartment-building) also emphasized the remarkable importance, in this special situation, of two factors in friendship-formation—first of distance, including even very small distances, and second of physical design, particularly the orientation of houses and the location of stairways.[8]

[6] See GUNNAR MYRDAL, AN AMERICAN DILEMMA lvi, 23-25 (1944).

[7] Abrams, *Residential Propinquity as a Factor in Marriage Selection*, 8 AM. SOC. REV. 288 (1943) (in New Haven).

[8] LEON FESTINGER, STANLEY SCHACHTER AND KURT BACK, SOCIAL PRESSURES IN INFORMAL GROUPS

Most friendships in this project developed either within the same court or within the same floor in a larger building, and a large proportion occurred between families living only a few feet apart. Moreover, those few families who lived in houses facing away from their courts fared noticeably worse, while in the larger buildings those living near the stairways fared noticeably better.

Similarly, a study of different patterns of inter-racial public housing in otherwise quite similar projects located in two neighboring large North-Eastern cities also brought out the importance of proximity in developing friendly relationships.[9] In one city, where the projects had completely integrated inter-racial occupancy, the result was a striking degree of mutual friendliness within the projects. In a nearby city, whites and Negroes were segregated into different parts of each project, and the result was a good deal of distrust and lack of knowledge. In these cases the influence of the occupancy pattern actually overcame and dominated attitudes derived from varying religious, political and educational backgrounds.

The influence of environment upon living patterns has also been documented in other areas. Almost everyone is now familiar with the considerable relationship between bad housing conditions and tuberculosis, crime, juvenile delinquency, etc. A study of the distribution of mental disease in a metropolis indicated that most (though not all) types of psychosis arose primarily in certain areas, particularly the central roominghouse areas, which had a peculiar kind of social organization and physical facilities available therefor.[10] In his classic description of Southern inter-racial etiquette, Myrdal noted an entertaining little point—that a new architectural trend, the development of houses built without any back door, was necessarily beginning to undermine one feature of that caste etiquette, the requirement that Negroes always go to the back door of houses occupied by whites.[11] All these instances merely underline the rather obvious point that the facilities available for living have considerable effect upon how people live.

Assuming that democracy requires a substantial degree of mutual respect, the point suggested by these findings may be stated more generally. The development of such mutual respect between various groups is dependent in considerable degree upon some opportunity for regular human contacts, preferably in a relationship which implies equality rather than difference in status. Moreover, the importance of living near members of other groups is specifically emphasized. However, the needs

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(1950). The projects were at M.I.T. The most remarkable thing about this pattern is that it developed among a homogeneous group where the husbands had other regular contacts, in the classroom. Yet the temporary nature of the occupancy may have had other influences on the pattern.

[9] MORTON DEUTSCH and MARY E. COLLINS, INTERRACIAL HOUSING (1951). The two cities were New York and Newark. The immediate result of this study was that the Newark Housing Authority adopted the same fully integrated renting pattern as New York.

[10] R.E.L. FARIS and H. W. DUNHAM, MENTAL DISORDERS IN URBAN AREAS (1939) (on Chicago). The exceptions were manic-depressive psychosis and catatonic schizophrenia. One striking fact, which might indicate a special limitation on the general thesis of this article in certain types of areas, is that members of ethnic groups living in areas which were populated largely by other ethnic groups, generally had high rates of schizophrenia and alcoholic psychosis.

[11] MYRDAL, *op. cit. supra* note 6, at 613.

of the situation vary as American society changes. In the "good old days" of small-town America, inter-group contacts were more or less automatic; residential segregation by income group was either limited or more or less non-existent, and everybody saw everybody else "down-street" regularly anyway. A considerable number of people still live in such communities, but the great majority no longer do. The growth of big cities brought a great increase in residential and social segregation by classes and by ethnic groups, often sharply divided even when physically adjacent (in "Dead End" fashion). The big question is whether, and how, such contacts are to arise in the situation which is developing from current trends in urban and suburban migration and development.

B. Current Changes in the Physical Environment

If it is true that the physical environment has a substantial effect upon living patterns and thus upon democratic development, then it is appropriate to review briefly current changes in that environment, before turning to an analysis of various devices to regulate the development thereof.

1. *Residential.* Large-scale changes are taking place in connection with the development of new residential areas. First, the scale of development of land for residential purposes has changed. Before the last war, most residential construction was done by small operators erecting a few houses apiece; but now a very sizable proportion of new housing—up to nearly half the total in some cities—is developed in large projects, each ranging from a few blocks to the equivalent of a large city.[12] Second, new building forms are emerging, particularly among the big projects—garden apartments, tall apartment buildings set in open land apart from streets, ranch houses, etc.; and each of these is likely to involve new living patterns. A major change here is the freeing of residential site planning by breaking away from the traditional gridiron street pattern. Third, various new density patterns are emerging, as more open space tends to appear around all kinds of residential buildings, and as buildings get taller. A generation or two ago, apartments were synonymous with huge bulky buildings with high coverage,[13] and even single-family detached houses were often crowded so close together that neighbors could shake hands across from house to house. However, new apartment developments now often have a density lower than that of two-family houses, and sometimes comparable to single-family houses. For single-family detached houses the 30-foot lot has become an anachronism, and lots between 50 and 100 feet in width are common, even apart from luxury housing. On the other hand, the taller new apartment build-

[12] For example, Stuyvesant Town in New York City would, if a separate city, be about the 25th largest city in that state; and the second Levittown, in Bucks County, Pennyslvania, would (when completed) be about the 10th largest city in that state. And yet, since these qualify generally as private developments, they are not generally subject to the sanctions applicable against state action in many communities which are only a small fraction of their size. See discussion on pp. 341-343 and note 79 *infra*. *Compare* Marsh v. Alabama, 326 U.S. 501 (1946).

[13] The general attitude of the times towards bulky apartments invading low-density residential areas is reflected in such decisions as Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925), and Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925).

ings, even when set in open land, often represent an increase in density. In general, while the new developments represent great gains in physical amenities, their effect upon neighborliness is at least questionable.

2. *Non-Residential.* Commercial and industrial development is also undergoing considerable change. Within a few decades, the focus of shopping activity in this country has shifted from the old-time village store, first to the city department store and speciality shop, and now increasingly from the latter to the outlying suburban shopping center—usually centering around a super-market, several chain stores, and perhaps a branch department store, and surrounded by huge areas for parking. Obviously each of these forms results in quite different patterns of human contacts. In a similar (or shorter) period, the main emphasis in recreation has shifted, first from the home (parlor games and visiting on the front porch) to activities outside the home (the automobile, movies, country clubs, and amusement parks), and now partly back towards the home with the development of television. Here there has been increased variety of opportunity, some genuine cultural development, much sleazy commercialism, and perhaps some net loss in the opportunities for human contacts.

Industrial development is also changing considerably. For example, the shift of the power base toward electricity has opened the way for more decentralization of industry; and new manufacturing plants, set in big lawns, often look more like community centers than like the traditional factory building, dark and dreary and usually belching smoke.

3. *Transportation.* Underlying many of these, and perhaps most important of all, the new developments in transportation have made their influence felt everywhere. As a result of the growth of automotive traffic, the old urban street systems have been overwhelmed, so that both traffic movement and off-street parking[14] have become major urban headaches; new residential development has sprawled out away from employment areas, and has filled in the areas between the radial pattern of transit lines; and industry has been similarly freed from dependence upon facilities for rail and water transport. The great increase in travel-to-work by automobile, heavily subsidized by huge public expenditures on highways, has led to the controversy on "rails v. rubber"—*i.e.*, whether public policy and investment should encourage mass rapid transit along with (or instead of) more automotive traffic, and especially individual cars, as the best means of bringing large numbers of people into metropolitan centers without cluttering their overcrowded streets with even more cars. Meanwhile air transport has brought the whole country within the

[14] Increasing traffic has brought about a complete reversal in the attitude towards off-street parking facilities in the last forty years. In the early zoning ordinances, garages were often prohibited in general commercial districts—partly because garages then were often converted stables, and the aroma tended to linger on. Recently accessory off-street parking spaces (which, despite certain important differences from commercial garages, are still basically the same type of facility) have been widely not only permitted but required, in commercial and even in residential districts.

compass of a few hours' trip, and created new urban problems, with noise and danger tending to blight huge areas around the airports.[15]

C. Current Changes in the Social Environment

Even more than changes in the types of new buildings, changing trends in occupancy of buildings—particularly residential buildings[16]—have significant effects upon the development of democratic living patterns. For now, as during most of American history, large numbers of people are moving around the country, and as a result great changes are occurring in the distribution of ethnic, racial, economic, and age groups in residential areas.

1. *Migration.* The remarkable amount of current movement all over the country is bringing about the rapid development of new areas, great changes in the occupancy of older areas, and new demands for public services everywhere. Several major trends are evident. In the first place, the long-term movement from countryside and small town to the big cities is changing from a general nation-wide pattern to a heavy concentration in two special types of movement. First, migration is continuing from East and Midwest to the rapidly growing metropolitan areas in the West and the Southwest, for climatic or economic reasons; the Iowans in Los Angeles are a famous example.[17] Also, there has been a great increase in the migration of Negroes from Southern rural areas to both Southern and Northern big cities, in order to improve their economic and their cultural position; and certain areas have also experienced large-scale in-migration of Puerto Ricans or Mexicans. In the second place, the movement of upper- and middle-income whites from the big cities out into new low-density areas, usually suburban areas with separate local governments, is approaching flood proportions. The resulting changes in the development and occupancy of residential areas constitute the background for many of the most important recent constitutional problems related to planning the future environment. For example, what may turn up in zoning as a building-type or density regulation may in fact be an expression of the conflict between different groups over occupancy of some residential area.

2. *Homogeneous or Heterogeneous Residential Areas.* One of the major factors in the occupancy of residential areas or communities is whether they are homogeneous or heterogeneous, particularly with respect to four major types of characteristics—ethnic, racial, economic, and age. This aspect of the environment has particular significance with respect to the promotion of democratic values, especially because of the current trends in migration mentioned above.

[15] An analogous phenomenon, and one which causes a very large part of the friction in zoning, is the problem of what to do with the extensive frontage along heavily-travelled streets. Usually there is insufficient demand for business to use more than a part of it; and yet such frontage is likely to be both none too pleasant for residential use, and rather unsafe at least for families with small children.

[16] While the rest of this article will be concerned with occupancy of residences, there are important problems which arise in connection with employment, shopping, recreation, etc., which also deserve detailed consideration.

[17] CAREY MCWILLIAMS, SOUTHERN CALIFORNIA COUNTRY 167 ff. (1946).

In addition to its primary significance in connection with the possibility of developing friendly human contacts and mutual respect between groups living near each other, the question of homogeneity or heterogeneity in residential areas has other major indirect consequences. First, schools and many other public facilities normally serve the residential areas nearby, and so residential segregation provides the foundation for segregation in these other facilities. Even where communities are proceeding with the best faith in the world to abolish segregation in the schools, in accordance with the recent Supreme Court decision,[18] most children belonging to minority groups are likely to continue in segregated schools as long as the residential areas from which they come remain segregated. Second, in the frequent case of rapidly-growing minority groups, the restricted space available for their housing in segregated areas results in acute overcrowding of available residences; and this overcrowding in turn results in various social tensions and cultural strains—the existence of which is then used as an argument against expansion of the crowded areas! Moreover, there is another not inconsiderable point. So long as these minority groups remain boxed up in inadequate and overcrowded areas, there will be special difficulties in the way of small-scale experiments in developing integrated residential areas. For when an area begins to open up to members of some minority, there is often an interim period of unstable occupancy; and during this period, unless the situation is handled skillfully and with restraint, the acute pressure for more minority housing may result either in open violence, or in a complete overturn in occupancy—*i.e.*, not in integration but merely in an expansion of the segregated areas.

It should be frankly recognized that the basic question here is one of two conflicting sets of moral values, both of which exert a powerful influence on the American mind. On one side is "The American Creed" of equality and equal treatment for all. On the other is the preference for those who are culturally similar, combined with the desire to maintain status—"keeping up with the Joneses."

3. *Ethnic.* American history is rich in experience in handling ethnic conflicts, deriving from the gradual but continuous partial amalgamation of national, religious and other ethnic groups.[19] This is the famous "melting pot," a major theme in American history from the conflicting seventeenth century ethnic frontiers of settlements from different European countries to the current cultural strains sometimes associated with the movement of various minority groups (Jewish, Italian, Polish, etc.) into residential areas. The speed and ease of assimilation are likely to depend upon the extent of the economic and cultural differences involved. Immigrants from Great Britain and France have generally been assimilated rapidly, and the same has often been true of the Germans, because their economic and cultural status

[18] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

[19] Prejudices against ethnic and racial groups regularly affect the lives of at least one-sixth of the population, of which the great majority are Negroes, Jews, and Mexicans. In addition, there are other groups which are affected in certain localities, but not universally. See Williams, *Discrimination and Segregation in Minority Housing*, 9 AM. J. ECON. AND SOC. 85 (1949).

has resembled that of the rest of the population. On the other hand, after their arrival en masse in the mid-nineteenth century, the Irish,[20] and in some areas the Scandinavians, were culturally more different, economically more impoverished, created more difficult conflicts, and took longer to assimilate. The mass immigration of Italians and various Eastern European groups, particularly around the turn of this century, resulted in a similar pattern. The degree of cultural difference between each ethnic group and the rest of the population, and so the degree of resistance to that group's movement into residential areas, now depends primarily upon how long that group has been in this country. The essential point is that all over the country, there are all sorts of ethnic groups at all different stages in the process of assimilation.

Among the many problems created during assimilation,[21] we are concerned here with the segregation of ethnic groups in residential areas, and their gradual residential de-segregation. For each successive immigrant group which started with substantial cultural differences, the residential pattern has normally gone through a series of successive stages. At first such immigrants voluntarily gather in homogeneous areas, sometimes not dissimilar from the compulsory European ghetto, because of common language, customs, and educational and religious institutions, and perhaps similar employment opportunities. Most big cities have had or still have examples: the Irish in the North End of Boston, the Jews in the Lower East Side of New York, and the Italian areas in New Haven are familiar instances.[22] However, the pressures toward assimilation begin at once, particularly for the younger generation, through the public schools, the organs of mass communication, the desire for greater social prestige, and to some extent the necessities on the job. The next step is frequently a mass movement of the immigrant group, perhaps stimulated by social pressure from their children, into better housing, either by expansion nearby[23] or by a jump into an area further out; the Jewish shifts into the Bronx in New York and Lawndale in Chicago are examples of the latter.[24] Later, the final step is likely to be the gradual scattering of largely assimilated individuals into areas inhabited by the population as a whole.[25]

4. *Racial.* Racial differences may be described as ethnic differences plus a difference in skin pigmentation; and the major significance of "race"[26] in American society

[20] See generally OSCAR HANDLIN, BOSTON'S IMMIGRANTS 1790-1865 (1941).

[21] While assimilation tends to reduce inter-cultural tension and generally facilitates democratic development, it of course also tends to destroy some of the color and vitality of a diverse group of cultures.

[22] See, for example, HANDLIN, *op. cit. supra* note 20, at 99 ff.; LOUIS WIRTH, THE GHETTO 195 ff. (1928); IRVIN L. CHILD, ITALIAN OR AMERICAN? 45 ff. (1943).

[23] See W. LLOYD WARNER and LEO SROLE, THE SOCIAL SYSTEMS OF AMERICAN ETHNIC GROUPS, c 3. *passim* (1945) (Newburyport, Mass.). According to this study, the successive assimilation or desegregation of various ethnic groups into residential areas lagged behind their rise in occupational status, but preceded their full social acceptance.

[24] See WIRTH, *op. cit. supra* note 22, at 241 ff.

[25] See WARNER AND SROLE, *op. cit. supra* note 23, c. 3 *passim*.

[26] The distinction between racial and other ethnic differences is clear-cut on Negroes, Chinese, and Japanese, and most of the small number of other Asiatics, but somewhat muddied on American Indians, Mexicans, and Puerto Ricans.

is particularly striking in connection with residential patterns. The essence of this American imperfect caste system, a survival of slavery in modified form which has been generalized to apply to other groups, is a direct contradiction of the democratic ideal—a concept of hereditary inferior status, with the premise that assimilation (particularly by inter-marriage) is to be prevented.[27] This system survives partly by an extraordinary mechanism of self-reinforcement, which operates in a vicious circle. A great premium is placed, particularly in the South where most Negroes still live or have been brought up, upon constant and overt exhibitions of subservience; and in such areas any apparent indications of ambition or worldly success are often frowned upon and penalized as being "uppity." Moreover, educational and recreational facilities are kept to a minimum, often quite consciously. Then any evidence that can be found of lack of ambition, ignorance, and crime is cited as justification for the repressive system. As indicated above, this general vicious-circle mechanism is substantially repeated in connection with housing: as a result of racial segregation, Negroes and other minorities are generally crowded into slums and shacks, urban and rural; and then the living habits which sometimes do result from such surroundings are used as arguments against expansion of the area available. The normal processes of cultural assimilation have thus been severely hampered in their operation with respect to Negroes, and also other "racial" minorities.

The most extreme American examples of residential segregation on a racial basis have been the Indian reservations and the compulsory internment of Japanese-Americans, including American citizens, in concentration camps for several years during the Second World War.[28] However, the residential concentration of American Negroes is the most important and the most typical problem.

Patterns of Negro residential settlement vary. In the older Southern cities, particularly Charleston, Negroes live scattered all over the city, though usually so situated to emphasize the difference in status. In Southern rural areas, mixed occupancy is also frequent, but again physical differentiation is usually all too evident, to indicate a status differentiation. On the other hand, in the small Southern towns, there is usually almost complete segregation, often in clusters of shacks at the edge of town. These are the conditions under which most American Negroes either grew up or still live.

In the North the situation has always been different. During the last century Northern urban Negroes generally lived intermingled with other lower-income groups, and were at most only semi-segregated.[29] However, the twentieth century

[27] See MYRDAL, *op. cit. supra* note 6, especially at 53 ff., 589 ff.

[28] See Comment, *Alien Enemies and Japanese-Americans: A Problem of Wartime Controls*, 51 YALE L. J. 1316 (1942); Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); *Ex parte* Endo, 323 U.S. 283 (1944); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945).

[29] For example, in early 19th century Boston, Negroes had a higher status (and inter-married more with the general population) than the newly immigrant Irish; and about one-half of the Negroes in Boston lived scattered all around town. HANDLIN, *op. cit. supra* note 20, at 75-76, 100-103, 182. See

mass migration of Southern rural Negroes has brought great changes for all Negroes living in Northern cities. The predominant pattern in this century has been one of increasing concentration, with the creation—for the first time—of the "Black Belts," areas with almost 100 per cent Negro occupancy.[30] The same pattern has been apparent in those Southern cities whose major growth is recent. Most housing in these areas is deteriorated, overcrowded, and very expensive—with all the usual effects of bad housing. Moreover, in such a ghetto pattern the relatively small but significant Negro upper-class, which provides so much of Negro leadership, is deprived of some of the primary rewards which normally result from an increased living standard in a free society. The anti-democratic implications of these trends are obvious and ominous.

However, there are now signs of a change in these trends, at least in the North. Since this large in-migration of lower-income Negroes (and also Puerto Ricans and/or Mexicans in some areas) has coincided with a huge out-migration of upper-income whites, there is only one possible result in the larger American cities—a substantial expansion of the residential areas occupied wholly or partly by non-whites. The present situation in such cities thus indicates two seemingly contradictory trends, an increasing concentration in the principal non-white areas, and a spilling-out around the edges. Whether the result will be more or less "Black Belt" concentration, with all that that means for inter-racial relations, remains to be seen.

Moreover, overt trends towards racially integrated residential areas are also evident, though still in a relatively small way. The principal example is, of course, the successful policy of full integration in the public housing projects in many Northern and Western cities—now including most of the largest cities in the country. Moreover, as indicated above, a comparative study of the results of integrated and semi-segregated policies in similar projects in two neighboring North-Eastern cities established the point definitively that a policy of integration had strikingly better results for inter-racial amity—so conclusively that the other city promptly adopted the integrated pattern.[31]

As for private housing, open violence has occurred around the edges of expanding Negro areas in some cities; yet here too there are also signs of a more successful pattern. As Negroes inevitably spread out from their existing areas, the result may be either an increase in the segregated area, or integration into a stable "mixed" neighborhood. A recent survey in San Francisco indicated that in many instances non-whites had moved into "white" neighborhoods without incident, and in fact often without even being noticed.[32] Even in Detroit and Chicago, two of the prin-

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also W. E. B. DUBOIS, THE PHILADELPHIA NEGRO (1899); ROBERT A. WARNER, NEW HAVEN NEGROES (1940).

[30] The literature on this subject is voluminous. ROBERT C. WEAVER, THE NEGRO GHETTO (1948), is excellent and comprehensive. See also ST. CLAIR DRAKE AND HORACE R. CAYTON, BLACK METROPOLIS (1945).

[31] See footnote 9 *supra*.

[32] See N. Y. Times, Dec. 13, 1954, p.1, col. 7. One quarter of those interviewed did not know that there had been non-white in-migration into their neighborhood, and three-quarters did not mention

cipal trouble areas, there have been recent examples of successful cooperative effort in local areas, including even at least one instance of integration of Negroes into a white property owners' association.[33]

In short, there are at present definite trends both toward and away from residential segregation on a racial basis.

5. *Economic.* While some progress is thus being made in reversing the trend towards racial segregation in housing, the trend in new residential development is definitely, and perhaps increasingly, towards increased segregation by economic groups. Most new suburban subdivisions are planned within a single price range, usually for upper-middle income whites but sometimes for lower-middle income whites. As a matter of law, public housing projects are limited to lower-income groups.[34] Moreover, in the central areas of the bigger cities, most new residential construction is either luxury or low-rent public housing.[35] As a result of these and other similar trends, it is increasingly true that Americans are living and coming into contact only with those of the same general income level.

However, segregation by economic groups in residential areas is not really a different problem from racial or ethnic segregation. Since most minorities are heavily concentrated in the lower-income groups, a successful policy of economic segregation will automatically bring about a very high degree of racial and ethnic segregation. In effect, economic segregation is not only the easiest but also the most effective form of racial and ethnic segregation; and so a high-rent housing project often turns up as an attempted "barrier" against expansion of a non-white area. A successful policy of economic, and therefore largely of racial and ethnic segregation, therefore provides in effect multiple protection against more democratic living.

In some cities conscious efforts have started to counteract these trends. For ex-

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the fact in a lengthy discussion. About one-fifth were actively friendly, about the same number hostile, and the rest more or less indifferent.

[33] Recent studies have shown similar trends in several of our great cities, including a rapid increase in non-white population—with a large part of the increase going into the "Black Belts," and so an increase in the number of almost solidly "non-white blocks," and yet also considerable scattering into new areas, and so an increase in the number of areas with some non-white population. While concentration is the most important fact, it must not be overemphasized; in 1950 about one-third of the blocks in Philadelphia and San Francisco had some non-white population. However, these studies do not provide any definitive answer on two critical problems—to what extent existing inter-racial neighborhoods, with something like a half-and-half division, are maintaining their stability, and to what extent expansion around the edges of a non-white area is resulting in integrated communities or in enlargement of the segregated area. See CITY OF PHILADELPHIA, COMMISSION ON HUMAN RELATIONS, PHILADELPHIA'S NEGRO POPULATION, FACTS ON HOUSING 4-13, 35-37 (1953); publications of City of Detroit, Mayor's Interracial Committee, particularly Schermer, *The Transitional Housing Area* (1952), and also *Distribution of Negro Population in Detroit*, THE DETROIT FOCUS, May-June, 1952; NEW YORK CITY PLANNING COMMISSION, REPORT ON TENANT RELOCATION 23 ff. (1954); SAN FRANCISCO DEP'T OF CITY PLANNING, THE POPULATION OF SAN FRANCISCO: A HALF-CENTURY OF CHANGE 19-20 (1954).

[34] U.S. Housing Act of 1937, 50 STAT. 888 (1937), as amended, 63 STAT. 429 (1949), 42 U.S.C. §1401 ff. (1952); see Beckett v. Housing Authority of Baltimore City, 198 Md. 71, 81 A.2d 215 (1951) and Neufeld v. O'Dwyer, 192 Misc. 538, 79 N.Y.S.2d 53 (Sup. Ct. 1948).

[35] For example, with new development almost wholly concentrated in luxury and low-rent public housing, Manhattan is increasingly becoming a residential area for the highest and lowest-income groups, with the middle class squeezed out.

ample, a middle-income housing project may be purposely located next to a low-rent public housing project, in order to restrict the trend towards economic ghetto-ism.

In addition to the direct implications for democratic living, the trends towards upper- and middle-class white concentrations in the suburbs, and lower-class white and non-white concentration in the cities, have other and broader implications. Inexpensive and even moderate-priced housing needs low-cost vacant land.[36] If the great mass of the lower-income groups, who are most in need of such housing, are excluded from the very areas where vacant land is available and being developed, most of them will in fact be forced to stay in the slums for a long period in the future. Moreover, particularly in view of the simultaneous flight of higher-income groups to the suburbs, the big cities, where most of such slums are located, are financially least able to take care of the heaviest burdens for locally financed public services—*i.e.*, for the education and health of the next generation.

Economic segregation in residential areas therefore also creates problems on racial and economic segregation, on the possibility of any substantial amount of new inexpensive housing, and on public education and health.

6. *Age.* Segregation of residential areas by age groups is also markedly increasing, since most new areas are developed primarily for young married couples with young children—*i.e.*, with 2-, 3- or sometimes 4-bedroom houses. The principal significance of this for planning lies elsewhere than in the realm of democratic values. In addition to the loss of the cultural stimulus of different age groups, such a trend inevitably creates a most serious problem in planning public facilities. If a large new area is developed all at once for a single age group, the problem of providing school facilities is almost insoluble. Huge overloads are almost certain to exist in the schools as enrollments climb to peak—and, if anywhere near enough schools are built at this time, these are likely to be half-empty thereafter.[37]

III

LEGAL CONTROL OVER THE DEVELOPMENT OF THE ENVIRONMENT

A. Residential Land Use Control—In General

In order to understand and evaluate the planning devices and the resulting constitutional decisions which have arisen out of the trends discussed above, these must be analyzed against a background of the various goals of land-use control in residential areas. What sort of an environment are we trying to create, and why? The literature of city planning is rather long on elaborate statements of abstract goals, and very short on discussions of specific aims and clear-cut ideas of how to go about approaching them.

The principal aims of residential land-use control, including zoning ordinances, enforcement of restrictive covenants, and common-law nuisance actions, are as follows:

[36] Except where there is a large subsidy to cut inflated slum costs.

[37] Some communities have avoided this dilemma by building less expensive buildings for temporary school use, and later conversion to other purposes, including housing or some other community use.

1. *Protection against physical dangers.* For example, a munitions dump does not belong next to a residence. While not common, such problems are obviously of primary importance when they do arise.

2. *Protection against the common-law nuisances.* These include noise and vibration, the various forms of air pollution (smoke, fumes, dust, etc.), excessive heat and cold, glaring lights, etc. While more common than the actually dangerous activities, these factors still do not play as important a role in land-use regulation as is sometimes thought.

3. *Protection against heavy traffic.* Restrictions on those establishments which create either substantially more traffic, or different kinds of traffic, from the characteristic establishments of an area, constitute a really major factor, both in residential density regulations and in use classification for residential (and in fact for other) zoning districts. Since traffic accidents are so large a factor in safety, and since traffic plays so dominant a role in urban noise and fumes, this might be considered a special case of numbers 1 and 2 above. As argued in Mr. Fonoroff's article in this symposium (see pp. 238-254, *supra*), this factor plays a much more important part in zoning regulations than has generally been realized, particularly by the courts.

4. *Protection against congestion.* Even apart from considerations arising from vehicular traffic, there is also a somewhat different type of problem—the protection of the relative degree of peace and quiet in a residential neighborhood against the bustle and noise which result from the presence of large numbers of people and their movement. This is a central element in residential density regulations, and also in several types of use regulations.

5. *Protection of light and air, and of open space.* Density regulations do set a general level of potential light and air and of open space around residences. Yet density regulations do not really provide effective control over such other factors, for—depending on the design—the available amount of each of these may vary considerably, within each level of density. Specific zoning devices are therefore appropriate in connection with each of the three major purposes of bulk zoning —to restrict density, to provide for light and air, and to provide for open space. Actually, one of the major curses of American zoning has been the usual attempt to provide both density control and open space largely through the medium of devices which are more appropriate to provide light and air—*i.e.*, yard, court and height regulations.

6. *Protection of morals.* While protection of morals is generally a minor element in zoning, it is sometimes invoked to justify special restrictions on taverns, pool halls, and other establishments thought to lead the young into bad habits. Normally these regulations will appear in the use regulations of commercial districts mapped near residential areas or near various types of community facilities.[38]

[38] Requirements in Connecticut for a specified distance between establishments selling intoxicating liquor have resulted in much litigation. See, for example, Stavola v. Bulkeley, 134 Conn. 186, 56 A.2d 645 (1947); Delaney v. Zoning Board of Appeals of City of Hartford, 134 Conn. 240, 56 A.2d 647 (1947).

7. *Protection against "aesthetic nuisances."* This involves structures or establishments which are offensive, not to the sense of hearing or to the sense of smell, but to the sense of sight. The general rule of constitutional law is supposed to be that, while this aesthetic factor may be taken into consideration in drawing zoning regulations under the police power, nevertheless "you cannot zone for aesthetics alone." This doctrine is based on a false conception of what goes on in zoning, and leads to some rather odd results. Because of this supposed rule, great difficulty is encountered in zoning against billboards (particularly in agricultural and commercial areas) and against other structures which are real eyesores. On the other hand, other regulations which are really much more drastic aesthetic controls are quite common and are often upheld regularly, though ostensibly on other grounds.[39]

8. *Protection against "psychological nuisances."* In other instances, there are strong objections to certain aspects of the environment, based not upon concrete physical factors but upon irrational fears and dislikes. There are two quite different types of situations in which this may occur. The first is the invasion of a residential environment by certain types of establishments around which irrational fears tend to center. Funeral parlors provide the obvious example of this type. The second type involves the entrance into residential neighborhoods of groups of people who are disliked for one reason or another—usually because of racial, ethnic or lower economic status. Regulations directed at the latter type of factors are much more common than is generally realized. The impolite term for this is "snob zoning."

9. *Regulation of the Rate of Development and Protection of the Municipal Tax Base.* Finally, certain types of zoning controls are concerned with regulating the rate and amount of development, particularly in order to keep some control over the resulting demand for public services and so the burden on the municipal tax base. Mr. Fagin's article in this symposium spells out some of the problems involved here (see pp. 298-304, *supra*).

While the factors discussed above comprise the major goals of residential land-use control, any discussion of such control would be incomplete without referring to two other alleged factors which are frequently cited as major considerations, in zoning opinions and elsewhere—protection of property values, and protection of the

[39] A colleague once remarked, during an exhaustive discussion of the whys of certain zoning districts: "The whole thing is really a matter of aesthetics and traffic, isn't it?—that is, apart from keeping out a few nuisance industries." This was a pardonable exaggeration of the realities of the situation. The real concern in many of the usual zoning regulations is how an area looks, particularly from the street side; and a large proportion of these involve quite stringent regulations. However, their primary purpose is often obscured, either by abstract phrases (such as "protection of property values" and "protection of the character of a neighborhood"—see pages 334, 344 *infra*), or by pretending that the regulation in question is motivated by some other reasons. (See note 2 *supra*). The ironical result is that very drastic aesthetic regulations are often upheld on the ground that they are really something else—whereas, with structures (such as billboards and neon signs) which involve real eyesores, the aesthetic motive is so clearly dominant that a great deal of trouble is encountered in upholding such regulations. What is supposed to be the traditional general rule of constitutional law, that "you cannot zone for aesthetics alone," is therefore pretty much nonsense. Moreover, the Supreme Court has just done what it could to abolish the traditional rule in Berman v. Parker, 348 U.S. 26 (1954).

"character of the neighborhood." The very extensive discussions of land-use controls in these terms contribute remarkably little understanding of what is going on; for each of these two factors is derivative, merely reflecting the presence of one or more of the other factors discussed above—and thus may, or may not, refer to something which is a proper subject for public regulation.

Protection of property values is of course the more important of these two. Anyone who has had to deal with local municipal problems is all too conscious of the extent to which most communities' ability to provide services still depends upon real property taxes, which in turn depend upon property values. But this is not the same as saying that a discussion concentrating on the immediate effect on property values is a very useful way to find out what is going on. What is said here is therefore in no sense an argument against protecting property values. The point is merely that it does not make sense to limit one's attention to such derivative factors, without looking into those basic factors which affect (or are thought to affect) property values.

When the argument is made that property values will be affected, what is meant is simply that some factor is present which some people may dislike, and which may therefore tend to result in a net reduction in the number of people interested in buying property in the area affected—thus tending to push values down. The real question is always a simple one—what is the factor which is involved? Some factors which affect property values (or which are thought to do so) are legitimate subjects for public regulation, by zoning or otherwise; others are not. For example, the invasion of factories and the movement of Negroes into a residential neighborhood both may be thought to affect property values.[40] Yet one is obviously a proper subject for zoning protection, while the other is not.[41] The fact that property values may be affected gives reason to look into the situation, but by itself tells nothing about whether governmental protection is appropriate.

The argument about protecting the "character of a neighborhood" involves similar problems. The question here is equally simple: what characteristics of an area are involved? Again, some characteristics present proper subjects for governmental action, while others do not; it is necessary to look into the situation further to find out first what is going on, and then whether something should be done about it. Actually the phrase "the character of a neighborhood" is usually used to refer to one of two things—either aesthetic characteristics, or those social characteristics which create some local opposition and thus fall into the category of "psychological nuisances." In other words, use of this phrase is usually a warning that either aesthetic zoning or snob zoning is involved.

B. Residential Segregation and Constitutional Law

There are several lines of cases which have arisen, directly or in part, out of the

[40] The theory that Negro movement into a "white" residential area results in a decline of property values has been subjected to increasing criticism lately. See for example Laurenti, *Effects of Non-White Purchases on Market Prices of Residences*, 20 APPRAISAL JOUR. 314 (1952).

[41] See discussion of racial zoning on page 336 *infra*.

above-described racial, ethnic and economic-group conflicts within residential areas. These lines of cases may be divided into three general types, differing on the extent to which private and public action are involved. The first involves direct governmental action, by statute or otherwise, to regulate private arrangements by forbidding certain racial, ethnic or economic groups from living or owning land in specified areas. The second involves the provision of public facilities (schools, housing, and the like) for such groups along with other groups. The third, between the other two, involves public assistance for private development (primarily in housing), and the implications of such assistance for segregation.

In all of these, the relation between public and private action plays an important role. For, in each of these lines of cases, one significant common element is involved. In each instance the traditional forms of residential discrimination by private action—such as refusal by owners to rent or sell, "codes of ethics" promulgated by and for real estate brokers,[42] withholding of credit by financial institutions, property owners' associations, and other highly organized pressures—have been inadequate to preserve the segregated pattern; and as a result the machinery of government has been invoked to help promote or protect residential segregation.

The first problem in reviewing these lines of decisions is therefore to have a clear understanding of the scope and legal significance of governmental, as contrasted with private, activity in these realms. In this connection understanding starts from a consideration of the broader implications of the great racial covenants cases.[43] For, quite apart from their epoch-making significance in relation to minority housing, these decisions also represented a major change of viewpoint towards the role of government—another major step away from the laissez-faire theory of the "passive policeman state." The broad principle established in these cases is that all forms of governmental activity, including specifically the enforcement of private contracts, constitute active intervention by the state and so "state action," which is subject to the guarantees of equal treatment embodied in the Fourteenth Amendment.

The question in the cases to be considered next is whether *all* processes involving any participation by government are also subject to the constitutional guarantees of equal treatment—or, if not, where to draw the line.

C. Racial and Ethnic Segregation—Outright Legal Requirements Applying to Private Development

Repeated attempts to enforce direct residential segregation along racial (and, to a lesser extent, ethnic) lines have resulted in prolonged and intensive litigation, and so a substantial body of constitutional law has grown up in this area. The law is now quite clear that such direct governmental action on behalf of segregation is unconstitutional. The problem is whether this has set up a general rule of law that

[42] A particularly striking example of organized private action by real estate groups, in effect to "zone" a city into "white" and "Negro" areas, is the map issued in 1944 by the St. Louis Real Estate Exchange, showing areas in which real estate brokers could sell land to Negroes. See HERMAN H. LONG AND CHARLES S. JOHNSON, PEOPLE VS. PROPERTY 60-61 (1947).

[43] Shelley v. Kraemer, 334 U.S. 1 (1948); and see Hurd v. Hodge, 334 U.S. 24 (1948).

restrictions on the occupancy of residential areas may not be directed against specific groups of people.[44]

1. *Racial Zoning.* Conflicts over residential segregation, and the resulting constitutional law on the subject, have both been largely a twentieth century affair. However, a startling early case arose in 1890, when a local ordinance ordered the entire Chinese population of San Francisco to move to another area—an order promptly invalidated by the federal courts.[45] However, it was when the great movement of Negroes, northward and to the cities, began about 1910 that racial zoning ordinances were enacted in a number of cities in the Southern and Border states.[46] Such ordinances allocated residential areas to either white or Negro occupancy, usually according to the race of the existing majority on each block.[47] In 1917, the Supreme Court held that such ordinances were unconstitutional, originally primarily on the ground that they constituted an unreasonable restriction on the rights of the white vendor to sell his property.[48] In spite of this decision, similar ordinances have been repeatedly passed in Southern cities almost right up to the present, including several ingenious but transparent subterfuges—which have been consistently struck down in court.[49]

2. *Racial Covenants.* Since outright racial zoning restrictions were thus in rather bad repute even legally, racial restrictive covenants were widely invoked to provide legal protection for segregated residential areas. Here again a late nineteenth century California case, disconnected from the main stream of the law, was prophetic, since the federal courts there refused to enforce an anti-Chinese covenant on the ground that such action would violate the equal protection clause.[50] However, starting about

[44] The equal protection clause in the Fourteenth Amendment of the Federal Constitution is directed against state action, and its guarantees apply to protect all persons, not merely citizens. Technically there is no such requirement in the Fifth Amendment applying to action by the Federal Government. But see Bolling v. Sharpe, 347 U.S. 497 (1954).

[45] *In re* Lee Sing, 43 Fed. 359 (C.C.N.D. Cal. 1890).

[46] These ordinances preceded the first American comprehensive zoning law, the New York law of 1916. The statement sometimes made, that racial zoning is another example of an originally beneficial legal device which was later perverted to other and anti-social purposes, is therefore hardly correct.

[47] See State v. Gurry, 121 Md. 534, 88 Atl. 546 (1913); Carey v. City of Atlanta, 143 Ga. 192, 84 S.E. 456 (1915); State v. Darnell, 166 N.C. 300, 81 S.E. 338 (1914) (with serious analysis of implications); Hopkins v. Richmond, 117 Va. 692, 86 S.E. 139 (1915); Harden v. City of Atlanta, 147 Ga. 248, 93 S.E. 401 (1917); Harris v. City of Louisville, 165 Ky. 559, 177 S.W. 472 (1915), *reversed along with* Buchanan v. Warley, 245 U.S. 60 (1917).

[48] Buchanan v. Warley, 245 U.S. 60 (1917).

[49] Jackson v. State, 132 Md. 311, 103 Atl. 910 (1918); Irvine v. City of Clifton Forge, 124 Va. 781, 97 S.E. 310 (1918); Tyler v. Harmon, 158 La. 439, 104 So. 200 (1925), 160 La. 943, 107 So. 704 (1926), *reversed per curiam,* 273 U.S. 668 (1927) (requirement of written consent of majority of those of opposite race living nearby); City of Richmond v. Deans, 37 F.2d 712 (4th Cir. 1930), *affirmed per curiam,* 281 U.S. 704 (1930) (prohibition against living near those with whom inter-marriage is forbidden); City of Dallas v. Liberty Annex Corporation, 19 S.W.2d 845 (Texas Civ. App. 1929) (alleged agreement between leaders of both races on division of city's residential areas); Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935); Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E.2d 867 (1940) (in regular zoning law); Monk v. City of Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949), *aff'd,* 185 F.2d 859 (5th Cir. 1950), *cert. denied,* 341 U.S. 940 (1951) (the latter ordinance reportedly allocated 16 per cent of the land in Birmingham for the 40 per cent of its population which was Negro).

[50] Gandolfo v. Hartman, 49 Fed. 181 (C.C.S.D. Cal. 1892).

1920, anti-Negro racial covenants were uniformly enforced in a long series of decisions, extending over some thirty years—which even achieved the dignity of a dictum in a Supreme Court opinion[51] and a series of *A.L.R.* annotations ("the courts are in agreement").[52] The theory in these cases was of course that such enforcement represented nothing more than carrying out the provisions of a private contract, which was regarded as a more or less ministerial task. The only exception was a supremely ironical one; in some states it was held that, while such covenants could not prevent Negroes from buying property, they could prevent them from using it.[53]

However, after the Second World War, the housing shortage and the continued migration from the rural South resulted in a rash of new racial covenants cases,[54] and enforcement of the covenants was challenged on all sorts of grounds. The arguments in these cases concerned allegations that such covenants involved unreasonable restraints upon alienation, were void for vagueness, violated public policy, failed to provide equal protection of the laws, and conflicted with the Civil Rights Act and with national obligations under the U.N. Charter.[55] However, the guarantee of equal protection of the laws was generally recognized as the real issue; and, on a serious level, the debate on this point was ended by the great dissenting opinion of Judge Edgerton in *Hurd v. Hodge* in the District of Columbia Court of Appeals.[56]

It has been contended that enforcement of covenants which exclude a race from a neighborhood does not involve discrimination because it permits reciprocity. This amounts to saying that if Negroes are excluded from decent housing they may retaliate by excluding whites from slums.

On appeal, the Supreme Court overruled the massive body of precedent accumulated over so many years and held (in *Shelley v. Kraemer*)[57] that the equal protection clause prevented the enforcement of racial covenants by injunction or eviction orders in the state courts, and (in *Hurd v. Hodge*)[58] that the Civil Rights Act had the same effect (at least for citizens) in the federal courts of the District of Columbia. These decisions (particularly *Shelley*) rested squarely on the premise that such a judicial order itself represented action by the State, and that for this purpose it made no

[51] Corrigan v. Buckley, 271 U.S. 323, 331 (1926).

[52] 162 A.L.R. 180 (1946); and see also 9 A.L.R. 120 (1920); 66 A.L.R. 531 (1930); 114 A.L.R. 1237 (1938). But compare 3 A.L.R.2d 466,467 (1949).

[53] See 3 A.L.R.2d 466, 490 (1949).

[54] See Kemp v. Rubin, 188 Misc. 310, 69 N.Y.S.2d 680 (Sup. Ct. 1947), *reversed mem.*, 273 App. Div. 789, 75 N.Y.S.2d 768 (2d Dep't 1947), *aff'd mem.*, 298 N.Y. 590, 81 N.E.2d 325 (1948); Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947), *reversed*, 334 U.S. 1 (1948); Perkins v. Trustees of Monroe Ave. Church of Christ, 79 Ohio App. 457, 70 N.E.2d 487 (1946); Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946), *reversed*, 334 U.S. 1 (1948); Schwartz v. Hubbard, 198 Okla. 194, 177 P.2d 117 (1947); Eakers v. Clopton, 199 Okla. 99, 184 P.2d 247 (1947); Hurd v. Hodge, 162 F.2d 233 (D.C. Cir. 1947), *reversed*, 334 U.S. 24 (1948).

[55] See discussion in *Zoning and Planning Notes*, The American City, May 1947, p. 103; *id.*, Aug. 1947, p. 125; *id.*, Sept. 1948, p. 141.

[56] 162 F.2d 233, 239 (D.C. Cir. 1947), *reversed*, 334 U.S. 24 (1948).

[57] 334 U.S. 1 (1948).

[58] 334 U.S. 24 (1948).

difference whether the legal basis for the order was derived from an ordinance or from common-law precedent. In the last six years this decision has had considerable effect in opening up new areas, at least for upper-class Negro occupancy.

Nevertheless, even after this, one more major legal obstacle turned up. Rather incredibly, the state courts still split on the question as to whether a judicial order to pay money damages, for violation of a covenant, likewise represented the proscribed "state action" and so was subject to the equal protection clause.[59] However, in 1953 in *Barrows v. Jackson* the Supreme Court finally settled this point too.[60]

Covenants directed against ethnic groups have been rather less common, and have also had more difficulty in court, for no particular logical reason. While there have been few opinions, anti-Semitic covenants were said to be invalid by the courts even during the heydey of racial covenants.[61]

Now that the great legal battle on racial covenants is over, the law on residential segregation has turned to other areas of conflict. At least one of these involves an even more drastic series of direct prohibitions on land-ownership.

3. *Alien Land Laws.* The alien land laws in twelve Western states go beyond even racial zoning by forbidding certain types of aliens to own any land anywhere in the state.[62] There is no overt reference to racial criteria in these laws. However, the subterfuge was fairly transparent, for these laws took over, from the naturalization laws, a classification which is clearly racial—by forbidding land-ownership by those aliens who were ineligible for naturalization, which originally included Japanese, Chinese, and certain other Asiatics. The present constitutional status of such laws is interesting. In a series of test cases in 1923,[63] the Supreme Court upheld them on really extraordinary grounds—essentially by adopting the proposition that, since the obligations of a medieval feudal landowner included military duties, therefore (!) a state government in twentieth century America also has a special interest in the loyalty of its landowners, and may for this reason forbid ownership of land, not by all aliens, by by certain racial groups who were ineligible for naturalization. Revival of enforcement of this legislation during and after the Second World War reached what must be a new low in petty meanness, and resulted in a new

[59] Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949) (for enforcement); Roberts v. Curtis, 93 F. Supp. 604 (D.D.C. 1950) (against enforcement); Correll v. Earley, 205 Okla. 366, 237 P.2d 1017 (1951) (for enforcement); Phillips v. Neff, 332 Mich. 389, 52 N.W.2d 158 (1952) (against enforcement); Barrows v. Jackson, 112 Cal. App.2d 534, 247 P.2d 99 (1952) (against enforcement), *aff'd*, 346 U.S. 249 (1953). On brokers' commissions and purchaser's right to recover a deposit, see Savage v. Parks, 100 A.2d 450 (D.C. Mun. Ct. App. 1953).

[60] 346 U.S. 249 (1953).

[61] Miller v. Jersey Coast Resorts Corporation, 98 N.J.Eq. 289, 297, 130 Atl. 824, 828 (Ch. 1925) (anti-Semitic covenant described as invalid in dictum). Ironically, more recently a Virginia covenant directed against "persons who customarily observe the seventh day of the week as the Sabbath" was first invoked against a Seventh-Day Adventist. See also *Re* Drummond Wren, [1945] Ont. L.R. 778.

[62] California, Arizona, Louisiana, New Mexico, Idaho, Montana, Oregon, and Kansas, all similar, passed between 1913 and 1925; Utah and Wyoming, passed in 1943; Washington (1889) and Arkansas (1943), following a different form.

[63] Terrace v. Thompson, 263 U.S. 197; Porterfield v. Webb, 263 U.S. 225; Webb. v. O'Brien, 263 U.S. 313; Frick v. Webb, 263 U.S. 326—all in 1923.

series of constitutional decisions. A rebuttable statutory presumption in the California alien land law provided that conveyances of land to infant children (who could be citizens and thus lawful land-owners under the statute) were made to evade the law; and in 1948 this presumption was invalidated by the Supreme Court, in a decision which (by a 5 to 4 vote) avoided a direct re-appraisal of the substantive issue.[64] However, since then the Supreme Courts of Oregon and California have, on their own initiative, held that, under modern views of constitutional law, the decisions upholding the alien land laws have been in effect overruled "sub silentio,"[65] and so such laws are now unconstitutional;[66] and Congress, by repealing the restrictions on naturalization of Asiatics, has made the alien land laws of no effect. Thus ends one of the more inglorious episodes in American legal history.

D. Racial and Ethnic Segregation—in Public Facilities

Another major constitutional problem is whether segregation in public facilities in itself constitutes discrimination, and so a denial of equal protection of the laws. During the post-Reconstruction period, when statutory discrimination against Negroes was increasing in the South, the Supreme Court followed the dominant trend of the times and laid down the "separate but equal" doctrine—*i.e.*, that legal requirements for separate facilities (in the original case, transportation facilities) were constitutional so long as the facilities provided were substantially equal.[67] Yet this doctrine has been severely shaken by the recent decision against segregation in the public schools.[68]

1. *Schools.* Recent developments on segregation in education are of special significance in relation to segregation in residential areas, partly because these are two vital areas of human contact, partly because residential segregation has so great an influence on segregation in the schools and other facilities. In the North and West most educational facilities have been more or less fully integrated for many years, except that school district lines are often drawn so as to result in segregated schools. However, school segregation has been mandatory in the Southern states, and permissive in a few adjacent areas. The existence of the "separate but equal" doctrine did not prevent the actual inequalities from being very striking. This is hardly surprising; for a major raison d'être of that system, along with its background in race prejudice, has been that it made it possible for the dominant whites to chisel on facilities for Negro children, in order either to save money or to shift funds so as to provide better education for their own children.

The triumphant constitutional attack upon this segregated system began in con-

[64] Oyama v. California, 332 U.S. 633 (1948). Compare Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

[65] See Chief Justice Taft, dissenting in Adkins v. Children's Hospital, 261 U.S. 525, 564 (1923).

[66] Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949); Sei Fujii v. State of California, 217 P.2d 481 (District Ct. of Appeal 1950), *rehearing denied*, 218 P.2d 595 (District Ct. of Appeal 1950), *aff'd*, 38 Cal.2d 718, 242 P.2d 617 (1952); Masaoka v. People, 39 Cal.2d 883, 245 P.2d 1062 (1952). Compare Palermo v. Stockton Theatres, 32 Cal.2d 53, 195 P.2d 1 (1948).

[67] Plessy v. Ferguson, 163 U.S. 537 (1896).

[68] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

nection with higher education,[69] and culminated in the recent epoch-making decision in *Brown v. Board of Education* that segregation in public educational facilities necessarily involves discrimination, and thus violates the equal protection clause. The rationale of this opinion,[70] that education is so basic an area of life that segregation there is intolerable in a democratic society, has an obvious application to segregation in living accommodations.

No final Supreme Court decree has yet been formulated to implement the *Brown* decision, and there is a wide range of choices.[71] However, it must always be remembered that the best efforts to implement such a policy are bound to be relatively ineffective, as long as the residential areas served by the schools continue to be segregated. For residential segregation is a basic problem not only for its own implications, but because it is likely to determine the effectiveness of attempts to desegregate schools and other facilities.

To return to problems directly involving residential areas—now that the constitutional issues arising from direct governmental action to exclude certain groups from specific areas have been largely settled, the principal legal problems have shifted to a new area—discrimination in public and publicly aided housing. For when government undertakes either to build new housing, or to provide various types of assistance for those who do so, a stand necessarily has to be taken, one way or the other, on the segregated pattern of occupancy of much urban land. And a decision to exclude certain groups from public or publicly aided housing involves legal issues at least as serious as those discussed above.

2. *Public Housing.* Since most minority groups are heavily concentrated in the lower-income groups, access to public housing is much more important to most members of minority groups than access to any other type of new housing. The public housing program has provided a substantial amount of housing for low-income Negroes, generally in accordance with their relative need—*i.e.*, in proportion to the percentage of Negroes in the lower-income groups served by the program, which is of course much larger than the percentage of Negroes in the total population. However, the majority of public housing projects all over the country have been either

[69] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950). Compare the older cases of Cumming v. Board of Education of Richmond County, 175 U.S. 528 (1899); Gong Lum v. Rice, 275 U.S. 78 (1927).

[70] See 347 U.S. 483, 494-495 (1954): "To separate them [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . ."

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. . . ."

See also the lower court decision in Belton v. Gebhardt, 87 A.2d 862 (Ct. of Chancery 1952), *aff'd*, 91 A.2d 137 (Sup. Ct. 1952), affirmed in the same proceeding as the *Brown* decision.

[71] For active steps toward integration, see the statements reported in the N.Y. Times, Oct. 27, 1954, p. 13, col. 6 (on investigation by state officials of alleged segregation in the schools in Englewood, N. J.); *id.*, Dec. 18, 1954, p. 17, cols. 6-7 (on the closing of an all-Negro state school in Bordentown, N. J., to break up its segregated pattern); and *id.*, Dec. 24, 1954, p. 15, col. 8 (on the creation of a special commission by the New York City Board of Education to consider whether further steps are necessary to deal with any possible segregation in the City's schools).

segregated (by project) or semi-segregated (by building or stair-well)—*i.e.*, in this one area the "separate but equal" formula has been followed more or less honestly. In some projects there has been outright segregation. In others, the device has been to reproduce the existing pattern in the area which has been cleared and rebuilt—which may result in segregation or otherwise. Nevertheless, particularly since 1945, many of the great Northern and Western cities, and a considerable number of the smaller ones, have followed the lead of New York City in adopting a fully integrated rental policy—*i.e.*, apartments are rented all over the projects without regard to racial background.[72] The number of integrated public housing projects has thus been increasing rapidly. Moreover, a number of decisions have held very recently that, following *Brown v. Board of Education*, segregation in public housing necessarily involves discrimination and therefore involves a denial of equal protection.[73]

E. Racial and Ethnic Segregation—In Publicly Assisted Housing

1. *Urban Redevelopment.* Under another program, pioneered in New York, Chicago, and Philadelphia, and powerfully stimulated by federal financial and technical aid since 1949, the powers of government (including eminent domain and technical assistance) are used for slum clearance, and the land is then sold for redevelopment, usually by private action, and often with at least partial local tax-exemption.[74] Because of the various forms of governmental aid involved, the issue has been sharply drawn on discrimination in such projects. In Stuyvesant Town in New York, the first really large project (with a population of around 25,000), which had the benefit of both eminent domain and partial tax exemption, the developer (the Metropolitan Life Insurance Company) announced an all-white renting

[72] New York, Chicago, Los Angeles, Cleveland, Washington, Boston, San Francisco, Pittsburgh, Buffalo, Seattle, Newark, and Wilmington are among the large cities which have now adopted the policy of fully integrated public housing projects.

[73] In Banks v. Housing Authority of City and County of San Francisco, 120 Cal. App.2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954), San Francisco public housing projects started before 1949 were still segregated by a requirement of conformity to the previous neighborhood pattern, with one small project so far allocated to Negro occupancy; and at the end of the total program, public housing was supposed to be available to all groups according to their proportionate needs. The court held that this arrangement violated each individual Negro's right to equal protection, and the Supreme Court refused to review. In Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (Super Ct. 1954), Negroes were segregated into part of one Elizabeth project, with about 9 per cent of the total public housing dwelling units available for their use—allegedly corresponding to the proportion of Negroes in the city's population. The court held, rather sharply, that this violated both federal and state constitutions. In Vann v. Toledo Metropolitan Housing Authority, 113 F. Supp. 210 (N.D. Ohio 1953), the opinion again went against segregation, although the practice was discontinued while the action was pending. In Jones v. City of Hamtramck, 121 F. Supp. 123 (E.D. Mich. 1954), the court granted a summary judgment forbidding discrimination against Negroes in the city's first housing project. Two older decisions split on segregation in public housing: Seawell v. MacWithey, 2 N.J. Super. 255, 63 A.2d 542 (Super. Ct. 1949) (against segregation), *reversed on other grounds*, 2 N.J. 563, 67 A.2d 309 (1949); Favors v. Randall, 40 F. Supp. 743 (E.D. Pa. 1941) (for segregation). See also Kankakee County Housing Authority v. Spurlock, 120 N.E.2d 561 (Ill. 1954) (allegation, as a defense in eminent domain proceeding, that project would be segregated, held not proven).

[74] See Housing Act of 1949, 63 STAT. 413 ff. (1949), as amended, 68 STAT. 590 (1954), 42 U.S.C. §1441 (Supp. 1954).

policy. When this was challenged in court, it was held first that the challenge was premature,[75] and then in effect that it was too late. In *Dorsey v. Stuyvesant Town*,[76] the latter decision, the New York Court of Appeals split 4 to 3, with Judge Bromley and the majority holding in effect that Metropolitan was a public benefactor, and a powerful dissent by Judge Fuld tearing the majority opinion to shreds but never quite developing a satisfactory alternative rationale on the basic question—how much state aid is necessary to bring a project under the sanctions applicable to "state action." If this nation-wide program of urban re-building is a success, the implications of such huge segregated projects are obvious enough; yet the Supreme Court refused to review this decision. However, in New York City a combination of public pressure and local legislation, first prospectively for future projects and then retroactively,[77] forced Metropolitan to a reversal of the policy; and, despite dire predictions that such a policy would kill off any additional private redevelopment projects, the city continues to lead the nation in the volume of such projects. Discrimination has also been forbidden in future projects in several other areas, including the state of Pennsylvania and the city of San Francisco.[78]

2. *F.H.A.* The Federal Housing Administration has provided federal insurance of mortgages for a large proportion of private housing built during the last twenty years. The agency serves the private real estate market, and tends to reflect its attitudes. A problem immediately arises as to whether the power of government shall be used to insure mortgages on racially restricted property. In addition to doing this, for many years the F.H.A. concentrated almost entirely on "white" housing, and actually insisted upon anti-Negro racial covenants as a prerequisite to granting mortgage insurance. In short, the Federal Government became the prime mover in closing off newly developed land from minority housing. However, several years ago this policy was at least ostensibly reversed as a result of Administration pressure; and the F.H.A. has also recently bestirred itself to promote a relatively small amount of Negro housing, almost all segregated.[79]

In summary, then, use of the constitutional guarantee of equal protection to eliminate racial segregation is rapidly extending, especially in connection with segregation in education and in residential areas. Moreover, the distinction between public and private facilities is being more and more blurred as programs for joint public

[75] Pratt v. LaGuardia, 182 Misc. 462, 47 N.Y.S.2d 359 (Sup. Ct. 1944), *aff'd mem.*, 268 App. Div. 973, 52 N.Y.S.2d 569 (1st Dep't 1944), *appeal dismissed*, 294 N.Y. 842, 62 N.E.2d 394 (1945) (holding that the action was premature, since Metropolitan at that time had not yet adopted a definite policy on renting).

[76] 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). Here the rationale of the majority opinion was that, since in 1943 it was common knowledge that discrimination was to be practiced in the project, the City and the Legislature must have deliberately approved of this—and, further, that this discrimination was put into effect without any "state action."

[77] See ADMINISTRATIVE CODE OF THE CITY OF NEW YORK §§J41-1.2 and W41-1.0 (Supp. 1952).

[78] See PA. STAT. ANN. tit. 35, §1664 (Purdon, Supp. 1953).

[79] On January 13, 1955, the National Association for the Advancement of Colored People started a lawsuit against the Levitts, on the ground that F.H.A. mortgage insurance on their huge new development at Levittown, Pennsylvania (see note 12 *supra*) should be held to preclude discrimination against Negroes in selling homes there. See N.Y. Times, Jan. 14, 1955, p. 23, col. 7.

and private effort are developed. The exact outer limits of the effectiveness of these guarantees in publicly aided private facilities are not yet apparent.

F. Segregation by Economic Groups

In various areas, the law has thus been moving towards two general propositions. First, under the Constitution (and specifically under the equal protection clause) the facilities of government may not be used to prevent people from moving into and living in a given area, because of the color of their skin. Second, the now badly shaken "separate but equal" doctrine has no more place in living than in learning, so that segregation in residential areas (as in educational facilities) automatically involves discrimination.

The next question is an obvious one—whether the same principle applies to invalidate governmental action aimed at preventing people from moving into specified areas because of the size of their income.[80] Clearly, in a society with democratic pretensions, one question is as basic as the other. And the second question raises serious questions about several types of residential land-use controls, primarily zoning regulations.

1. *Overt Zoning for Economic Segregation.* It is generally assumed that it would be unconstitutional for government to take direct and overt action to segregate residential areas by income levels—for example, by restricting specified areas to those with incomes over $10,000, or to homes worth over $25,000. There is some legal authority to this effect, though not much—because few communities have been so bold as to try this.[81] However, restrictive covenants specifying the minimum value of a house have been very common—perhaps almost as common as racial covenants—and are generally presumed to be valid and enforceable, even now. In fact, this is often cited as an example of what can be done by covenants but not by zoning. However, the basic principle of *Shelley v. Kraemer*[82] is that "state action" includes the enforcement of contracts by the courts, and therefore that the courts cannot order something done to carry out a contract if the same would be unconstitutional when provided for by an ordinance. Under this principle, it is difficult to see what logic there is in the above-stated distinction between covenants and zoning.

2. *By Subterfuge.* If, however, residential segregation by income groups is attempted, not by specifying the minimum cost of a house, but by translating that minimum cost into the equivalent minimum size of house, then there is at least a

[80] The last twenty years have seen a long struggle to convert the Fourteenth Amendment from an instrument for economic protection of corporate groups back towards its original primary aim to prevent discrimination against under-privileged racial groups. It would be somewhat ironical if the courts were now to hold that, in this critical field of law, the guarantee of equal treatment is directed solely at preventing racial discrimination, and is not concerned with equal protection for other under-privileged economic groups.

[81] See Stein v. Long Branch, 2 N.J. Misc. 121 (Sup. Ct. 1924); County Commissioners of Anne Arundel County v. Ward, 186 Md. 330, 340, 46 A.2d 684, 688 (1946); Brookdale Homes v. Johnson, 123 N.J. Law 602, 606, 10 A.2d 477, 478 (Sup. Ct. 1940), *aff'd*, 126 N.J. Law 5 6, 19 A.2d 868 (1941), *overruled in the Wayne Township* case (see note 84 *infra*).

[82] 334 U.S. 1 (1948).

possibility that all of the difficulties will suddenly and magically disappear. The size of a house is of course a direct function of its cost, or perhaps rather vice versa; in fact, building costs are rather generally quoted in terms of so much per square foot (or cubic foot). Thus, if residential building costs average $15 a square foot, a regulation requiring a minimum of 1,000 square feet of floor area accomplishes exactly the same thing as a regulation requiring houses to cost at least $15,000. This point is so elementary, and the subterfuge so obvious, that in most American decisions local zoning regulations specifying the minimum permitted size of residential buildings (whether phrased in terms of cubage or of floor area) have generally been invalidated as a thinly disguised form of economic segregation.[83] Nevertheless, in several recent decisions the situation has been sufficiently muddled, sometimes by a suddenly discovered local enthusiasm for public health regulations and sometimes by an undue deference to local autonomy, that minimum-building-size regulations have been upheld;[84] and here again, in one important case, the Supreme Court refused to review. The constitutional status of such regulations must therefore be analyzed with some care.[85]

Several arguments are brought forward in support of minimum-building-size regulations. First, such regulations are said to protect property values and "the character of a neighborhood." As always, these phrases are merely another way of saying something else—in this case, that many home-owners would prefer not to have smaller houses nearby, either because they want economic segregation, or be-

[83] Senefsky v. City of Huntington Woods, 307 Mich. 728, 12 N.W.2d 387 (1943) (1300 square feet); Frischkorn Construction Co. v. Lambert, 315 Mich. 556, 24 N.W.2d 209 (1946) (800 square feet at first floor level, and 14,000 cubic feet); Elizabeth Lake Estates v. Waterford Township, 317 Mich. 359, 26 N.W.2d 788 (1947) (500 square feet at first floor level, and 10,000 cubic feet); Hitchman v. Oakland Township, 329 Mich. 331, 45 N.W.2d 306 (1951) (800 square feet at first floor level, and 10,000 cubic feet); Baker v. Somerville, 138 Neb. 466, 293 N.W. 326 (1940) (2000 square feet for one-story houses) (and see Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N.W.2d 364 (1944)); American Veterans Housing Cooperative v. Zoning Board of Adjustment, 69 Pa. D. & C. 449 (C.P. 1949) (1400 square feet, with sliding scale of regulations for other districts); Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954) (1800 square feet for a two-story house, with sliding scale of regulations for other districts). There are also many cases invalidating minimum height restrictions. See generally the discussion in C. A. and A. H. RATHKOPF, THE LAW OF ZONING AND PLANNING 456-463 (2d ed. 1949), which the authors state in their preface is based upon a memorandum by Ralph W. Crolly, one of America's distinguished zoning lawyers.

[84] Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex. Civ. App. 1948) (900 square feet—referring to promoting "the beauty of a fashionable residence neighborhood"); Flower Hill Building Corp. v. Village of Flower Hill, 199 Misc. 344, 100 N.Y.S.2d 903 (Sup. Ct. 1950) (1800 square feet); Lionshead Lake v. Wayne Township, 8 N.J. Super. 468, 73 A.2d 287 (Super. Ct. 1950), *reversed*, 9 N.J. Super. 83, 74 A.2d 609 (App. Div. 1950), and 13 N.J. Super. 490, 80 A.2d 650 (Super. Ct. 1951), *reversed*, 10 N.J 165, 89 A.2d 693 (1952), *appeal dismissed for want of a substantial federal question*, 344 U.S. 919 (1953) (768 square feet for a one-story house, applying generally in an area of about 25 square miles); De Mars v. Zoning Commission of Town of Bolton, 19 Conn. Sup. 24, 109 A.2d 876 (1954) (requirements varying with the number of stories). See also Kinsey v. City of Rome, 84 Ga. App. 671, 67 S.E.2d 206 (1951); Commonwealth v. McLaughlin, 168 Pa. Super. 442, 78 A.2d 880 (Super. Ct. 1951).

[85] For more extended discussion, see Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Nolan and Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); *Zoning and Planning Notes*, The American City, Feb. 1951, p. 129, *id.*, Oct. 1951, p. 130; *id.*, Nov. 1951, p. 131; Crolly and Norton, *Public Health and Minimum House Size*, 72 REGIONAL PLAN ASSOCIATION ZONING BULL. 1 (1954).

cause of a feeling that small houses are necessarily less attractive—which is very close to the same thing. No doubt there are many people who do have such feelings—and no doubt they would like to have the use of governmental powers in order to achieve this end. In other words, such regulations are partly snob zoning, and partly a rather extreme example of aesthetic zoning, heavily interrelated with snob attitudes.

The second argument for minimum-building-size regulations is concerned with the municipal tax base, and brings out even more sharply (if possible) the basic motive of economic segregation, by spelling out another alleged advantage thereof. According to this argument, a community is entitled to require that all housing built therein shall pay enough real estate taxes to cover, or at least to make a substantial contribution towards covering, the cost of educational and other services required by its occupants. Real estate taxes are generally based on a percentage of assessed value. This argument is then that the cost of housing must be forced up in a district or community—thus promoting economic segregation—in order to force up real estate tax payments. Those who cannot afford bigger houses, and higher taxes, are excluded. This is of course also a direct statement of regressive tax policy.

If regulations such as these are widespread and successful, the implications for the future are clear enough. The great mass of the lower-income groups will continue to live in the existing slum housing, since there would be practically no place left where any substantial amount of new low-cost housing could be built on vacant land. Moreover, the cost of providing for the education and the health of the next generation would be thrown more upon the already heavily over-burdened big cities, which are already increasingly unable to provide adequate services for their inhabitants. One may be permitted to doubt whether, all in all, this is a very effective way to promote public health.

A recognition that local zoning requirements on minimum building size arise in fact from considerations other than local concern over public health, is thus but minimum realism. It is apparent that the predominant motives are quite different, and the results will in fact probably be likewise. However, to recognize this is not to say that the size of interior living space has no relation to public health; obviously such a relationship may exist, particularly as a result of the emotional strains resulting when overcrowding actually exists. The problem is to develop criteria to distinguish the real public health regulations from the phony ones. While this is no easy task, a few guideposts are apparent at once. First, it can hardly be seriously argued that such regulations are directed at overcrowing if they do not also include any accompanying control over occupancy.[86] The same is true if (as frequently) different standards are set for one- and two-story houses.[87] It is equally true if

[86] Significantly, there is no indication in the opinions that the cases listed in footnotes 83 and 84 *supra* included any occupancy controls. In the recent *Medinger* opinion (*supra* note 83), the Pennsylvania court stressed these implications of this omission.

[87] Such a distinction was made in *Wayne Township* (*supra* note 84) (768 square feet for a one-story house, 1000 square feet for a two-story house with an attached garage, and 1200 square feet for

there is a sliding scale of requirements for different districts,[88] with larger houses required in the more expensive lower-density districts, where in fact families tend to be smaller. It is also true if buildings of the required minimum size would conform to public health standards for 2- or 3-person families, or more.[89] To regard these merely as ineffectual attempts to regulate overcrowding—as, in effect, legislative ineptitude over and above the call of duty—is to miss the point. The point is that these regulations were concerned with something else, quite specific and quite recognizable; and the public health argument was merely an ill-fitting after-thought.

However, if municipal officials are really determined to use this device for economic segregation, it would not be hard to dress an ordinance up to meet all the tests stated above. The question on local minimum-building-size regulations thus has to be faced squarely. So long as such regulations are in effect on a local basis, both their intent and their effect is likely to be to promote economic segregation. However, if the same controls are in effect on a state-wide or other large-area basis, it may be assumed that they will be adjusted to realistic possibilities in relation to housing needs.[90]

3. *Indirect Effects of Other Zoning Regulations.* If governmental support for residential segregation by income groups is to be taken seriously, it must be recognized that the problem is not so simple as merely to invalidate those zoning regulations whose sole raison d'être is to promote economic segregation. Several traditional zoning devices, which are primarily concerned with other matters, may nevertheless play an important role along the same lines. The clearest examples are found in the two primary types of residential zoning districts—building-type regulations and density regulations.

As for building-type zoning districts, the restriction of most low-density areas and of most vacant land to single-family detached residences—or sometimes to single- and two-family residences, or to the same plus four-family residences, or some other

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a two-story house without an attached garage) and apparently in *Medinger* (*supra* note 83) as well. These distinctions in *Wayne Township*, particularly between two-story houses with and without an attached garage, make clear that ordinance's primary concern with how houses looked.

[88] The *Medinger* opinion brought this point out. However, the two dissenting judges in the New Jersey Supreme Court in *Wayne Township* (where a single set of regulations applied uniformly in an area of about 25 square miles) argued the contrary—that a sliding-scale would have been better constitutionally.

[89] For example, the requirement in *Wayne Township* for 768 square feet in a one-story house—a figure apparently actually selected to fit the standard dimensions of locally available lumber—was a bit larger than the public health standard for 2-person families (750 square feet) which was invoked in defence of the ordinance. See AMERICAN PUBLIC HEALTH ASSOCIATION, COMMITTEE ON THE HYGIENE OF HOUSING, PLANNING THE HOME FOR OCCUPANCY 36 (1950). This reduces the public-health argument for that ordinance to the proposition that a locality may exclude housing for two-person families—a clearly preposterous proposition of constitutional law.

[90] It would no doubt seem an odd doctrine of constitutional law that what is clearly constitutional, if done by the state, is unconstitutional if done locally. Yet the distinctions on policy stated in the text are quite apparent, and there is no reason why courts should be the only agencies of government which do not know what is going on. While it has obvious disadvantages, the distinction between a law's intent and direct effect, and its indirect effect, is widely used in other fields of law (including eminent domain for public housing and urban redevelopment), and may be applicable here.

similar combination—is often thought of as a density regulation. However, as noted above, apartments are now frequently developed at the same or lower density; and in fact in single-family districts, the real density regulation is not this restriction to single-family houses, but is rather the lot-size, lot-width, and/or side-yard regulations. Be that as it may, such single-family regulations are of course generally accepted as an integral part of modern zoning. However, the most economical way to build good inexpensive housing is probably either in row housing or in taller apartment buildings—partly because of savings on the extra cost of outer walls all around (and also of subsequent heating bills), and sometimes also because of savings in the costs of land and utilities. The effect of such widespread use of single-family zoning restrictions is thus either to raise the cost of moderate-priced shelter, or to lower the other amenities in order to neutralize these increased costs.

The usual highly emotional basis for such zoning arises from the traditional American preference for single-family homes and a large front yard, primarily as symbols of middle-class status. However, here the aesthetic motive is also involved, partly because of the feeling that owner-occupied housing tends to be maintained better.

Genuine density restrictions in residential areas are, as indicated on pages 332 and 345 *supra,* based upon many of the primary factors in zoning—protection of residential areas against the noise and bustle resulting from congestion, against heavy vehicular traffic and the resulting dangers to safety, against overcrowding of community facilities, and against inadequate amounts of light, air, and open space. Nevertheless, a realistic view of such zoning restrictions must recognize that indirectly they may add to the cost of providing housing, because of the increased cost of land, and especially of frontage and so of utilities. On the other hand, the case against congestion is so compelling on all these grounds that density restrictions are universally agreed to be essential.

The constitutional problem on economic segregation is acute only in the case of extremely low-density regulations, particularly acreage zoning restrictions.[91] In some cases such restrictions represent an attempt to preserve a quiet and attractive semi-rural atmosphere, with little noise or bustle and practically no vehicular traffic, and with plenty of room for outdoor play. In such cases it is difficult to draw an arbitrary line at an acre, or anywhere else, to indicate what are the lowest-density regulations

[91] Such regulations have been upheld in several recent decisions. Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516 (1942) (one acre); Dilliard v. Village of North Hills, 195 Misc. 875, 91 N.Y.S.2d 542 (Sup. Ct. 1949), *reversed mem.,* 276 App. Div. 969, 94 N.Y.S.2d 715 (2d Dep't 1950) (2-acre requirement upheld on appeal "as an elastic application of police power"); Gignoux v. Village of Kings Point, 199 Misc. 485, 99 N.Y.S.2d 280 (Sup. Ct. 1950) (one acre); Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed for want of a substantial federal question,* 344 U.S. 802 (1952) (3 acres); Franmor Realty Co. v. Village of Old Westbury, 280 App. Div. 945, 116 N.Y.S.2d 68 (2d Dep't 1952), *motion for leave to appeal dismissed,* 304 N.Y. 843, 109 N.E.2d 714 (1952), *and see* 281 App. Div. 993, 121 N.Y.S.2d 95 (2d Dep't 1953) (2 acres); Fischer v. Township of Bedminster, 21 N.J. Super 81, 90 A.2d 757 (Super Ct. 1952), *aff'd,* 11 N.J. 194, 93 A.2d 378 (1952) (5 acres). In these cases the legal argument has usually focussed upon the question of due process to the developer, not on equal protection for potential residents.

which can be upheld. In other instances, in estate areas or where land costs are high, there is no question but that acreage zoning regulations are clearly snob restrictions. In still other cases, acreage zoning is not intended to provide for acreage development at all, but to hold back the development of large areas, to prevent the scattering of development. In other words, zoning is here being used as a substitute for subdivision controls regulating the amount and location of development. It is likely to require a very sophisticated community analysis to determine which of these situations is which.

There is a difference, sometimes rather subtle but none the less real, between those communities which want to grow by admitting only "the right kind of people," and others which do not want to grow at all. The latter type of communities simply does not want *anybody* to move in, because it prefers to maintain its status as a small semi-rural or rural village, untouched by "development." It is difficult to see how any constitutional argument can be brought against such a policy on equal-protection grounds. In some instances, such resistance to development may stand in the way of the best over-all regional pattern—and in such cases the importance of the latter must be balanced against respect for local autonomy and the preservation of small areas with a quiet rural way of life. An example of this attitude, though not a particularly typical one, appears in an important recent New Jersey case on non-conforming uses. In *Borough of Rockleigh v. Astral Industries*,[92] the proprietors of a non-conforming factory located in a rural Borough, with 25 homes and 105 residents in Northern Bergen County, built a water-tower for fire-protection, and also a large water main to bring water to the tower. The Borough authorities objected on the ground that their policy had long opposed bringing a larger water supply into the Borough, since that might encourage more intensive development; and in the resulting lawsuit the court held that the offending water-tower was an unlawful extension of a non-conforming use.

IV

CONCLUSION

It is a major premise of American democracy that familiarity, at least in the context of economic security and decent living conditions, breeds not contempt but mutual respect. It is a major problem of American democracy that current trends in the development of the physical and social environment are tending to reduce the opportunities for those regular contacts which may result in spontaneous familiarity between different racial, ethnic and economic groups. In an era otherwise characterized by signs of decreasing social fluidity and decreasing racial contacts, such trends have ominous implications for the future of democracy. Now that small-town society, where friendships and mutual personal respect have a chance to arise naturally between all groups, is no longer a dominant factor in the national scene,

[92] 23 N.J. Super. 255, 92 A.2d 851 (Super. Ct. 1952), *reversed*, 29 N.J. Super. 154, 102 A.2d 84 (App. Div. 1953), and see 15 N.J. 591, 106 A.2d 41 (1954).

the problem is how such relationships will have an opportunity to develop within the forms of social organization which are emerging.

Even if prejudice were regarded as every individual's own business, discrimination—*i.e.*, prejudice translated into action—has such devastating effects upon large segments of the population that it is clearly everybody's business. What is particularly serious is that in this area the machinery of democratic government is itself often used successfully for anti-democratic ends—and that courts, constitutional lawyers, and the leaders of democratic thought and action remain unconcerned. Thus in the last few years, the Supreme Court has repeatedly refused to pass on grave constitutional questions arising in connection with regulation of the physical and social environment. The regulations involved in such cases have included: the exclusion of Negroes from a redevelopment project which had had the benefit of public donation of about 20 per cent of the site, eminent domain to obtain the rest of the site, and partial tax exemption;[93] a requirement of three acres of land for all homes built in a given district;[94] a minimum-building-size regulation (varying according to the number of stories and the presence or absence of an attached garage) which applied uniformly throughout an area of some 25 square miles, and which would apparently exclude about 70 per cent of the population from buying permanent new houses in such area;[95] the exclusion of Negroes from previously built public housing projects;[96] the exclusion of churches from residential districts;[97] and the restrictions in the alien land laws on land ownership by Japanese-Americans.[98]

This remarkable and widespread lack of interest is due in part to a lack of realization of the significance of a mis-planned environment, and in part to sheer muddleheadedness. The leaders of liberal-democratic thought are all too often so confused with abstractions ("health, safety, morals and welfare," "character of the neighborhood," etc.), so full of respect for local autonomy, and so fearful of judicial

[93] Dorsey v. Stuyvesant Town, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

[94] Flora Realty and Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1951), *appeal dismissed for want of a substantial federal question*, 344 U.S. 802 (1952).

[95] Lionshead Lake v. Wayne Township, 8 N.J. Super. 468, 73 A.2d 287 (Super. Ct. 1950), *reversed*, 9 N.J. Super. 83, 74 A.2d 609 (App. Div. 1950), and 13 N.J. Super. 490, 80 A.2d 650 (Super Ct. 1951), *reversed*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed for want of a substantial federal question*, 344 U.S. 919 (1953).

[96] Banks v. Housing Authority of City and County of San Francisco, 120 Cal. App.2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954).

[97] Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville, 90 Cal. App.2d 656, 203 P.2d 823 (1949), *appeal dismissed for want of a substantial federal question*, 338 U.S. 805 (1949).

[98] *Compare* Oyama v. California, 332 U.S. 633 (1948) *with* Sei Fujii v. State of California, 217 P.2d 481 (Dist. Ct. App. 1950), *rehearing denied*, 218 P.2d 595 (Dist. Ct. App. 1950), *aff'd*, 38 Cal.2d 718, 242 P.2d 617 (1952). See also Monk v. City of Birmingham, 87 F. Supp. 538 (N.D. Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951) (racial zoning again invalidated—see note 49 *supra*); Standard Oil Co. v. City of Tallahassee, 87 F. Supp. 145 (N.D. Fla. 1949), *aff'd*, 183 F.2d 410 (5th Cir. 1950), *cert. denied*, 340 U.S. 892 (1950) (compulsory amortization of nonconforming use upheld); McCarthy v. City of Manhattan Beach, 257 P.2d 679 (Cal. App. 1953), *aff'd*, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954) (exclusion of residences from beach-front district).

review generally, as to be unable to understand the implications of what is going on. It has not been generally realized that in many instances the problems arising in this field of constitutional law are closely akin to those involved in civil liberties law, and call for similar attitudes towards the exercise of governmental power.

Yet, on the whole, the picture is more encouraging than otherwise. There is plenty of evidence of trends which, though often unguided and uncorrelated, are pointing in the right direction. What is needed is a conscious over-all strategy for integration into a more democratic society. Such a strategy would be concerned with analyzing, understanding, and guiding action in wide areas of American life—in fact, everything connected with the development of the physical and social environment, with special emphasis on planning and housing and the relevant fields of law. So far as the special (and basic) problem of integrated residential areas is concerned, tactically it may be wise to concentrate first on the integration of groups whose differences, cultural or otherwise, are not too great; yet it must never be forgotten that the most challenging problems, and the most acute needs for housing and for education and other services, are among the lower-income groups and the racial and ethnic minorities.

In a program such as this, the law may serve both to shed light on the implications of the various problems involved, and actively to help lead the way towards a more democratic America. Herein lines the creative task of the planning lawyer in a democracy.

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